83-724

No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

IRENE GOMEZ-BETHKE, Commissioner, Minnesota Department of Human Rights; HUBERT H. HUMPHREY III, Attorney General of the State of Minnesota; and GEORGE A. BECK, Hearing Examiner of the State of Minnesota,

Appellants,

vs.

THE UNITED STATES JAYCEES, a non-profit Missouri corporation, on behalf of itself and its qualified members,

Appellee.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

APPENDIX TO APPELLANTS' JURISDICTIONAL STATEMENT

HUBERT H. HUMPHREY, III
Attorney General
State of Minnesota
KENT G. HARBISON
Counsel of Record
Chief Deputy
Attorney General
102 State Capitol Building
St. Paul, Minnesota 55155
Telephone: (612) 296-2351
Counsel for Appellants

Of Counsel:
RICHARD L. VARCO, JR.
Special Assistant
Attorney General
State of Minnesota

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APPENDIX

No. 82-1493

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

The United States Jaycees, a non-profit Missouri corporation, on behalf of itself and its qualified members,

Appellant,

vs.

Marilyn E. McClure, Commissioner, Minnesota Department of Human Rights; Warren Spannaus, Attorney General of the State of Minnesota; and George A. Beck, Hearing Examiner of the State of Minnesota,

Appellees.

On Appeal from the United States District Court for the District of Minnesota.

Submitted: November 11, 1982
Filed: June 7, 1983

Before LAY, Chief Judge, HENLEY, Senior Circuit Judge, and ARNOLD, Circuit Judge.

ARNOLD, Circuit Judge.

The United States Jaycees, a young men's civic and service organization, does not admit women to full membership. A Minnesota statute, as amended in 1972, forbids discrimination on the basis of sex in "places of public accommodation."

Minn. Stat. Ann. §§363.01 subd. 18, 363.03 subd. 3. The Supreme Court of Minnesota has interpreted this phrase to include the Jaycees, and the Minnesota Department of Human Rights has ordered the Jaycees to admit women to its local chapters in Minnesota. In this suit brought by the Jaycees, we are asked to declare the statute, as so applied and interpreted, unconstitutional, as in violation of the rights of speech, petition, assembly, and association guaranteed by the First and Fourteenth Amendments.

We hold that the Jaycees, a substantial part of whose activities involve the expression of social and political beliefs and the advocacy of legislation and constitutional change, does have a right of association protected by the First Amendment. In our opinion, the interest of the state, in the circumstances of this case, is not strong enough to deserve the label "compelling," so as to override this right. In addition, the state law is unconstitutionally vague. The Jaycees is therefore entitled to an injunction restraining the state from efforts to prohibit its membership policy under state law as presently written. This is not to say that no state law could be written to redress this kind of nongovernmental discrimination. Still less do we intend to express our own view of what the Jaycees is doing. But if, in the phrase of Justice Holmes, the First Amendment protects "the thought that we hate," it must also, on occasion, protect the association of which we disapprove. The First Amendment guarantees freedom of choice in a certain area. That freedom must, on occasion, include the freedom to choose what the majority believes is wrong. For reasons to be described, we think this is one of those occasions.[1]

[1] The Jaycees' refusal to admit women has given rise to several other court or agency opinions. See *Junior Chamber of Commerce of Kansas City, Missouri v. Missouri State Junior Chamber of*

I

The United States Jaycees is a nonprofit corporation organized under the laws of Missouri. Its national headquarters is in Tulsa, Oklahoma. It is a private (in the sense of nongovernmental) membership organization. It receives no federal or state funds, though it is exempt from federal income taxation under Section 501 of the Internal Revenue Code. At the time of the trial before the District Court in August of 1981, the Jaycees had about 295,000 regular members in 7400 local chapters. Article 2 of the Jaycees' By-Laws sets out the organization's purpose:

> A. This Corporation shall be a non-profit Corporation, organized for such educational and charitable purposes as will promote and foster the growth and development of young men's civic organizations in the United

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Commerce, 508 F.2d 1031 (8th Cir. 1975) (receipt of federal funds (a practice since discontinued) does not make Jaycees a governmental actor for purposes of the Fifth Amendment); *New York City Jaycees, Inc. v. The United States Jaycees, Inc.*, 512 F.2d 856 (2d Cir. 1975) (same); *Junior Chamber of Commerce of Rochester, Inc. v. United States Jaycees*, 495 F.2d 883 (10th Cir.), *cert. denied*, 419 U.S. 1026 (1974) (same); *United States Jaycees v. Bloomfield*, 434 A.2d 1379 (D.C. App. 1981) (Jaycees is not a "place of public accommodation" within the meaning of the D.C. Human Rights Act of 1977, D.C. Code §6-2241(a)(1) (Supp. 1978)); *Richardet v. Alaska Jaycees*, No. 3AN-79-424 CIV (Super. Ct. 3d Jud. Dist. of Alaska Sept. 15, 1980) (Jaycees is a place at which amusement or business services or commodities are offered to the public within the meaning of the Alaska public-accommodations law, Alaska Stat. §§18.80.230(1), .300(7)); *Fletcher v. U.S. Jaycees*, No. 78-BPA-0058-0071 (Mass. Comm'n Against Discrimination Jan. 27, 1981) (Jaycees is a place of public accommodation within the meaning of Mass. Gen. Laws Ann. ch. 272, §§92A, 98).

The question has also been vigorously debated within the organization. On three occasions a resolution favoring the admission of women has been defeated, but each time a larger minority has voted for it.

States, designed to inculcate in the individual membership of such organization a spirit of genuine Americanism and civic interest, and as a supplementary education institution to provide them with opportunity for personal development and achievement and an avenue for intelligent participation by young men in the affairs of their community, state and nation, and to develop true friendship and understanding among young men of all nations.

B. Towards these ends, this Corporation shall adopt the following as its Creed:

We believe
That faith in God gives meaning and
purpose to human life;
That the brotherhood of man transcends
the sovereignty of nations;
That economic justice can best be won by
free men through free enterprise;
That government should be of laws rather
than of men;
That earth's great treasure lies in human
personality;
And that service to humanity is the best
work of life.

This case centers around the Jaycees' requirements for membership. Article 4 of the By-Laws creates seven classes of membership, including Individual Members, also known as regular members, Associate Individual Members, and Local Organization Members, that is, local chapters. Between 1975 and 1978 women were permitted to become regular members in a few states[2] as part of a "pilot program," but the experi-

[2] The Minnesota State Jaycees voted not to participate in the pilot program.

ment was discontinued in 1978. As matters now stand, Article 4-2 of the By-Laws establishes the following requirements for regular membership:

> Young men between the ages of eighteen (18) and thirty-five (35), inclusive, of Local Organization Members in good standing in this Corporation shall be considered Individual Members of this Corporation (unless the ages for membership shall have been changed by the State Organization Member as hereinabove permitted by By-Law 4-4.A.).[3] Such Individual Members shall be qualified by, and represented through, the Local Organization Member so long as he shall pay the dues to the Local Organization Member specified in its by-laws, constitution or articles of incorporation (which shall include a subscription to FUTURE magazine).

Associate Individual Members may be businesses, associations, groups, or individuals, such as men over 35 or women, who are not eligible for regular membership. Associate members may not vote or hold office, but they may otherwise participate fully in Jaycee activities, except that they may not receive certain national awards. Local chapters must be "young men's organization[s] of good repute . . . organized for purposes similar to and consistent with those of this Corporation . . . ." By-Laws Art. 4-4A. The constitution, certificate of incorporation, and by-laws of local chapters must be consistent with and subject to the national and State by-laws, *id.* Art. 4-4C2; local chapters that change their rules so as to be inconsistent with the national by-laws may have their charters revoked, *id.* Art. 4-4F; and local chapters who

[3] Under By-Law Art. 4-4A a State Organization may restrict the minimum age of regular members to an age more than 18 but not more than 21.

lose their charter are forbidden to continue using the name "Jaycees," *id.* Art. 4-4I.

In 1974 the Minneapolis and St. Paul, Minnesota, local chapters began accepting women as full-fledged individual members. The U.S. Jaycees threatened to revoke the charters of these local organizations because of this infraction of its rules. Members of the Minneapolis and St. Paul chapters then, late in 1978, filed complaints with the Minnesota Department of Human Rights, a state agency created by statute to enforce the Minnesota Human Rights Act, Minn. Stat. Ann. §§363.01-.14. The complaints alleged that the Jaycees' exclusion of women from full membership violated Minn. Stat. Ann. §363.03 subd. 3, which read as follows:

> Subd. 3. *Public Accommodations.* It is an unfair discriminatory practice:
>
> To deny any person the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of a place of public accommodation because of race, color, creed, religion, disability, national origin or sex. It is an unfair discriminatory practice for a taxicab company to discriminate in the access to, full utilization of or benefit from service because of a person's disability.

The term "place of public accommodation" is defined in Minn. Stat. Ann. §363.01 subd. 18:

> Subd. 18. *Public Accommodations.* "Place of accommodation" means a business, accommodation, refreshment, entertainment, recreation, or transportation facility of any kind, whether licensed or not, whose goods, services, facilities, privileges, advantages or accommodations are extended, offered, sold, or otherwise made available to the public.

On January 25, 1979, the Commissioner of the Department of Human Rights found probable cause to believe that the statute had been violated and ordered that an evidentiary hearing be held before a state hearing examiner. On February 27, 1979, the Jaycees brought suit in the United States District Court for the District of Minnesota, seeking declaratory and injunctive relief against the enforcement of the Human Rights Act. The plaintiff claimed that application of the Act to force it to accept women as regular members would violate its rights of speech and association under the First and Fourteenth Amendments to the Constitution of the United States. It asked the District Court to abstain from deciding the constitutional question until the state administrative agency had decided whether the Jaycees fit the definition of "place of public accommodation" in the state law. The District Court, with the agreement of all parties, dismissed the suit without prejudice, stating that it could be renewed if the state administrative decision turned out to be adverse to the Jaycees. The parties continue to agree on this procedure, under which the state forum decides the meaning of the statute, and the federal courts decide its validity under the federal Constitution.[4]

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[4] This procedure is said to be in accord with *England v. Louisiana State Board of Medical Examiners*, 375 U.S. 411 (1964). But in *England* the federal suit was brought long before any state proceedings had begun, see 375 U.S. at 413 n.1. *England* holds only that parties remitted to the state forum under the doctrine of abstention to get an authoritative construction of state law, may thereafter return to the federal courts to litigate their federal constitutional claim. We are not sure that it is properly applied to a case in which state enforcement proceedings have already been instituted. In such a case, the state officials might well argue that the federal courts should bow out altogether, under the rule of *Younger v. Harris*, 401 U.S. 37 (1971), leaving the plaintiff to pre-

The state agency proceeding thereupon went forward, and an evidentiary hearing was held before a hearing examiner. Following the hearing, the examiner filed findings of fact and conclusions of law. He held that "the United States Jaycees are a place of public accommodation" and that the Jaycees had committed an unfair discriminatory practice. *State of Minnesota, by William L. Wilson, and his successor, Marilyn E. McClure, Commissioner, Department of Human Rights v. The United States Jaycees*, No. HR-79-014-GB, slip op. p. 9 (Minn. Office of Hearing Examiners, for the Dept. of Human Rights, findings, conclusions, and order filed October 9, 1979). The examiner entered the following order, *id.* at 9-10:

> It is hereby ordered that the United States Jaycees shall cease and desist and is hereby enjoined from:
>
> (1) Revoking the charter of any Jaycee local organization member ("local chapter") or state organization member (the "Minnesota Jaycees") within the State of Minnesota or denying any privilege or right of membership, or otherwise discriminating in any manner against a local or state organization member within the State of Minnesota because either extends to women all the rights and privileges of individual and regular membership.

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sent all of its arguments, state and federal, to the state administrative agency, to the state courts on review of the agency's decision, and then to the Supreme Court of the United States on appeal from or certiorari to the Supreme Court of the state. The defendants here have never made this suggestion. *Younger* is a doctrine of equitable discretion, not of subject-matter jurisdiction, and it can hardly have been an abuse of discretion for the District Court (or this Court) to decide the merits of plaintiff's federal claim when both sides urge precisely that.

(2) Discriminating on the basis of sex against any member or applicant for membership of a Jaycee local chapter within the State of Minnesota with respect to the terms, conditions, or privileges of membership in the local chapters or in the Minnesota Jaycees or in the United States Jaycees.

The Jaycees then came back to the District Court and, on October 31, 1979, filed the present suit, asking that the enforcement of the state agency's order be enjoined on federal constitutional grounds. The District Court certified to the Supreme Court of Minnesota the following question of state law:

> Is the United States Jaycees a "place of public accommodation" within the meaning of Minn. Stat. §363.01 Subdivision 18?

In an opinion filed on May 8, 1981, the Supreme Court of Minnesota answered yes. *United States Jaycees v. McClure*, 305 N.W.2d 764 (1981) (6-3 decision). The Court held that the plaintiff organization is "a business . . . facility . . . whose goods, . . . privileges, [and] advantages are . . . sold or otherwise made available to the public." See *id.* at 772. Men between 18 and 35 are indiscriminately admitted to membership, it said, without any selectivity. The organization is in the business of selling memberships, a business it assiduously promotes. Commercial language, *e.g.*, "marketing," is used to describe the recruitment of new members, and recruitment is heavily emphasized. There is no evidence that any man between 18 and 35 who wished to join the Jaycees has ever been refused. The leadership skills and personal-development techniques promised to new members if they become active Jaycees are the goods and advantages

that members buy when they pay their dues. The Court disclaimed any intention to affect "private organizations such as the Kiwanis International Organization":

> Private associations and organizations—those, for example, that are selective in membership—are unaffected by Minn. Stat. §363.01(18) (1980). Any suggestion that our decision today will affect such groups is unfounded.
>
> We, therefore, reject the [Jaycees] national organization's suggestion that it be viewed analogously to private organizations such as the Kiwanis International Organization.

Id. at 771.

Chief Justice Sheran, joined by Justices Peterson and Todd, dissented. The Chief Justice said:

> Although the result reached in the majority opinion is felicitous, I cannot believe that the members of the Minnesota legislature who voted for the law we have been called upon to construe thought the Junior Chamber of Commerce, a service organization, to be "a place of public accommodation." The obligation of the judiciary is to give that meaning to words accorded by common experience and understanding. To go beyond this is to intrude upon the policy-making function of the legislature. The majority opinion does that in this case to a degree which compels this expression of dissent.

Id. at 774.

The parties then returned to the District Court, which conducted an additional evidentiary hearing. On March 25, 1982, the District Court filed its opinion holding the Jaycees' constitutional claims without merit and dismissing the complaint with prejudice. *United States Jaycees v. McClure*, 534

F. Supp. 766 (D. Minn. 1982). The Court first considered whether the Jaycees' claimed "right to 'associate for the purpose of advancing only the interests of young men,'" *id.* at 770, was part of the freedom of association protected by the First Amendment. The Court noted that "[i]t is questionable whether association not directed at the exercise of other First Amendment rights enjoys constitutional protection," *ibid.*, but concluded that it need not resolve that question, because "if there is such a right, it has not been unconstitutionally denied to the Jaycees." *Ibid.* Two related reasons were given for this conclusion: that invidious private discrimination is not entitled to affirmative constitutional protection, and that the State's interest in preventing discrimination in access to public accommodations is in any event sufficiently compelling to override whatever right of association exists. The Court stressed, as had the Minnesota Supreme Court, that the Jaycees holds itself out as a leadership training organization, giving members an advantage in business and civic advancement. It characterized the process of recruitment as the sale of memberships. "The Jaycees itself refers to its members as customers and membership as a product it is selling." *Id.* at 769.

The District Court also rejected the Jaycees' arguments based on vagueness and overbreadth. As to vagueness the Court held that the "term 'place of public accommodation' when construed with normal aids to statutory construction can be understood by those of common understanding to apply to the Jaycees," *id.* at 773, especially in light of the opinion of the Minnesota Supreme Court. The overbreadth challenge was also rejected. As construed by the Supreme Court of Minnesota, "the statute is only applicable to public business facilities which practice sex discrimination." The

District Court rejected the argument that the statute as interpreted by the Supreme Court might apply to other organizations, "including the Boy Scouts, the Kiwanis, the Sweet Adelines, and the like," because "[t]here is insufficient evidence in the record pertaining to the activities of these groups to allow any determination whether the statute would apply to them and whether the groups engage in protected First Amendment activity." *Id.* at 773.

The plaintiff appeals, pressing again its threefold claim that the Minnesota Human Rights Act, as construed by the Supreme Court of Minnesota, violates its freedom of association, is void for vagueness, and is unconstitutionally overbroad.

II

The First Amendment, which the Fourteenth has made applicable to the states, reads as follows:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

The Amendment does not contain the word "association," nor does any other portion of the Constitution, as, for example, the Ninth Amendment or the Due Process Clause of the Fourteenth Amendment, protect by express words any "right" or "freedom" "of association." [sic] Defendants argue that association is constitutionally protected only as an incident of the specific rights listed in the First Amendment —religion, speech, press, and assembly to petition for redress of grievances. Since the Jaycees is nothing more than a business selling memberships and leadership training, they

argue, it has no right to First Amendment protection, except possibly the lesser degree of protected status enjoyed by purely commercial speech. Our first task, therefore, is to determine to what extent freedom of association is constitutionally protected, and whether the Jaycees' activities qualify for whatever protection the law affords. We of course take as a given that the Jaycees is a "place of public accommodation" within the meaning of the Minnesota statute. The Supreme Court of Minnesota has answered that question, and it has the last word. Its "construction fixes the meaning of of the statute [and] . . . puts . . . words in the statute as definitely as if it had been so amended by the legislature." *Winters v. New York*, 333 U.S. 507, 514 (1948). On the further question, though, whether the activity in question, whatever its significance under state law, is protected by the federal Constitution, we are not concluded by the opinion of the state court. We must decide that issue for ourselves. "[A] State cannot foreclose the exercise of constitutional rights by mere labels." *NAACP v. Button*, 371 U.S. 415, 429 (1963); *Bigelow v. Virginia*, 421 U.S. 809, 826 (1975).

A.

Many of the cases that have discussed freedom of association have arisen in the context of speech or political activity that is at the core of the First Amendment. *NAACP v. Alabama*, 357 U.S. 449 (1958), is such a case. There, the Supreme Court struck down a state-imposed requirement that the names of members of a politically unpopular group be made public, on the ground that the group's advocacy of political and legal change would thereby be unacceptably retarded. Similar protection has been extended to group use of litigation as a means for changing the law. *NAACP v. Button, supra*. See also *Buckley v. Valeo*, 424 U.S. 1, 25 (1976)

(per curiam) (association in support of political candidates). We know of no Supreme Court opinion, however, that rigidly limits the right of association to the context of political beliefs or expression. On the contrary, *NAACP v. Alabama* itself states that "it is immaterial whether the beliefs sought to be advanced by association pertain to political, economic, religious or cultural matters, and state action which may have the effect of curtailing the freedom to associate is subject to the closest scrutiny." 357 U.S. at 460-61. "It is beyond debate that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the 'liberty' assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech." *Id.* at 460.

Other cases go well beyond any concrete connection with the specific language of the First Amendment in describing the right of association. In *Shelton v. Tucker*, 364 U.S. 479 (1960), for example, the Court had before it an Arkansas statute requiring every teacher in a state-supported school or college, on pain of dismissal, to file each year an affidavit listing every organization to which he or she had belonged or regularly contributed within the last five years. The law was held invalid. The Court noted, among other things, that the statute "requires [teachers] to list, without number, every conceivable kind of associational tie—social, professional, political, avocational, or religious. Many such relationships could have no possible bearing upon the teacher's occupational competence or fitness." *Id.* at 488. The Court declared that "to compel a teacher to disclose his every associational tie is to impair that teacher's right of free association, a right closely allied to freedom of speech and a

right which, like free speech, lies at the foundation of a free society." *Id.* at 485-86. The Court may have suspected—and not without reason—that the statute under attack was part of a broader scheme to thwart the efforts of the NAACP to enforce the law of school desegregation. But the opinion is not placed on that ground (in fact, one of the plaintiffs went so far as to aver that he did *not* belong to the NAACP), and the Court does not imply that nonpolitical associations or groups ("social, professional, . . . avocational," *id.* at 488) are less protected than political or religious ones. Rather, the right of association is portrayed as a "fundamental personal libert[y]," *ibid.*, which the state may not broadly stifle if less drastic means are available to serve its legitimate purposes.

A more striking case is *United Mine Workers v. Illinois State Bar Ass'n*, 389 U.S. 217 (1967). The Supreme Court of Illinois, purporting to exercise the power to regulate the practice of law that courts had possessed (or thought they had) from time immemorial, had forbidden the United Mine Workers to employ a salaried attorney to prosecute workers' compensation claims for union members who "wished his services." *Id.* at 218. Such conduct, the Illinois courts thought, amounted to the unauthorized practice of law. The Supreme Court reversed and held the union's conduct protected by the First and Fourteenth Amendments. An attempt to distinguish *NAACP v. Button, supra*, "as concerned chiefly with litigation that can be characterized as a form of political expression" was rejected. 389 U.S. at 221. "We do not think our decisions in [*Railroad*] *Trainmen* [*v. Virginia Bar*, 377 U.S. 1 (1964),] and *Button* can be so narrowly limited. We hold that freedom of speech, assembly, and peti-

tion guaranteed by the First and Fourteenth Amendments gives petitioner the right to hire attorneys on a salary basis to assist its members in the assertion of their legal rights." 389 U.S. at 221-22 (footnote omitted). "The litigation in question is, of course, not bound up with political matters of acute social moment, as in *Button*, but the First Amendment does not protect speech and assembly only to the extent it can be characterized as political." *Id.* at 223.

Griswold v. Connecticut, 381 U.S. 479 (1965), contains perhaps the broadest statement of the right of association, though it may be dictum. "The association of people is not mentioned in the Constitution nor in the Bill of Rights," Justice Douglas said for the Court. "Yet the First Amendment has been construed to include" that right. *Id.* at 482. "[W]e have protected forms of 'association' that are not political in the customary sense but pertain to the social, legal, and economic benefit of the members." *Id.* at 483. The Court added, in words that have definite implications for the case before us:

> The right of "association," like the right of belief, is more than the right to attend a meeting; it includes the right to express one's attitudes or philosophies by membership in a group or by affiliation with it or by other lawful means. Association in that context is a form of expression of opinion; and while it is not expressly included in the First Amendment its existence is necessary in making the express guarantees fully meaningful.

Ibid. (citation omitted). Cf. *Healy v. James*, 408 U.S. 169, 181 (1972); *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 577-79 (plurality opinion of Burger, C.J., joined by White and Stevens, JJ.) (there is a right to assemble in

public places for any lawful purpose; the Constitution recognizes certain "important rights not enumerated," including "the rights of association and of privacy").

Our own cases have recognized a right of association in similar broad terms.[5] In *American Federation of State, County, and Municipal Workers v. Woodward*, 406 F.2d 137 (8th Cir. 1969), we held that the discharge of public employees on account of union activities was a violation of the First Amendment. "The First Amendment protects the right of one citizen to associate with other citizens for any lawful purpose free from government interference." *Id.* at 139. The broad language from *Griswold*, just quoted in this opinion, was cited as authority for that proposition. *Gay Lib v. University of Missouri*, 558 F.2d 848, *rehearing en banc denied by an equally divided Court*, 558 F.2d 859 (8th Cir. 1977), upheld the right of a student organization "comprised largely of homosexuals," *id.* at 850, to recognition by a university, despite the fact that homosexual *conduct* was a crime under the law of Missouri, a law whose validity the Court did not seem to question at the time. We quoted the passage from Justice Harlan's opinion in *NAACP v. Alabama*, *supra*, holding that freedom to associate for the purpose of advancing cultural beliefs is protected, 558 F.2d at 856, and we noted that the purpose of Gay Lib was not alone to advocate changes in the law—an activity within the narrowest interpretation of the First Amendment—but also to allow its members an opportunity for "meeting one another to discuss their common problems and possible solutions to those prob-

[5] The District Court observed that "Certain language in decisions of this circuit . . . suggests that freedom of association itself may be a 'basic constitutional freedom.'" 534 F. Supp at 770. We agree.

lems . . . ." *Id.* at 853 n.9 (quoting *Gay Alliance of Students v. Matthews*, 544 F.2d 162, 166 (4th Cir. 1976)). See also *Greminger v. Seaborn*, 584 F.2d 275, 278 (8th Cir. 1978) ("Freedom of association includes membership in unions or other organizations concerned with 'business or economic causes.'" (quoting *AFSCME v. Woodward, supra*, 406 F.2d at 139)).

We must be properly cautious, of course, about drawing broad conclusions from rather general statements in court opinions. The context in which a statement is made always colors or limits the apparent generality of the statement, to a greater or lesser degree. The job of courts is to decide cases. We do not write texts or law-review articles. But this much at least seems tolerably clear from our canvass of the Supreme Court's and our own opinions in this area: There are rights protected by the federal Constitution that are not specifically spelled out in so many words in that document. Among these rights is the right or freedom of association, and this right has not been rigidly limited to groups whose activities fall clearly within the specific guarantees of the First Amendment. One kind of association, *e.g.*, a political party, see *Cousins v. Wigoda*, 419 U.S. 477 (1975), may enjoy a greater degree of protection than another. It may be, for example, that association for ends specifically mentioned in the First Amendment will prevail against all state interests not regarded as "compelling," while other kinds of association may be required to yield to less imperative demands of public policy. The latter species of association, on this view, would be protected not by the specific guarantees of the Bill of Rights, but by the more nebulous concept of substantive due process, an oxymoron if there ever was

one.[6] Before deciding how far we must pursue this excursion into constitutional theory, however, we return to the specifics of this case, and inquire just what kind of association is involved here.

B.

Defendants' description of the Jaycees is simple and logical: The plaintiff organization is simply a business selling memberships, and the leadership training that goes with them, indiscriminately to any man between 18 and 35 who wishes to buy. The activity is purely commercial, and the State has the undoubted power to purge it of discrimination on the basis of irrelevant personal characteristics like sex. If the facts were as asserted, this case would be easy. No extended analysis would be necessary to show that the Jaycees must lose. With all deference to those who have reached a contrary conclusion, however, our study of the record leads us to the definite and firm conviction that this view of the Jaycees is so partial as to be distorted. The organization does not fit the bed of Procrustes that the defendants designed for it.

Certainly the Jaycees vigorously recruits new members, and stresses the supposed benefits of membership to its prospects' business careers as well as to their personal lives. Its activities are said to train members to manage their time better, to speak better, and to be better citizens. The term "marketing" has been used to describe this promotional process, and by using that and similar language the Jaycees

[6] This seems to be what Professor Tribe means when he suggests that association unrelated to the specific guarantees of the First Amendment "has been protected, if at all, only as an aspect of the less well pedigreed rights of privacy and personhood . . . ." Tribe, *American Constitutional Law* 701 (1977).

has been to some extent justifiably hoist with its own petard. So far the similarities with, say, the Dale Carnegie organization are plain. But much more is involved here. The Jaycees does not simply sell seats in some kind of personal-development classroom. Personal and business development, if they come, come not as products bought by members, but as by-products of activities in which members engage after they join the organization. These activities are variously social, civic, and ideological, and some of them fall within the narrowest view of First Amendment freedom of association.

Some of what local chapters do is purely social. They have parties, with no purpose more complicated than enjoying themselves. Some of it is civic. They have conducted a radio fund-raising drive to combat multiple sclerosis. They have conducted a women's professional golf tournament. They have engaged in many other charitable and educational projects for the public good. (And there is no claim, incidentally, of any discrimination in the offering to the public of the benefits of these projects. Money raised to fight disease, for example, is not used to benefit only male patients.) And they have advocated, through the years, a multitude of political and social causes. Governmental affairs is one of the chief areas of the organization's activity. Members on a national, state, and local basis are frequently meeting, debating issues of public policy, taking more or less controversial stands, and making opinions known to local, state, and national officials.

The record contains many examples of this political and ideological activity. We mention only a representative selection. The By-Laws and Policy Manual in effect at the time of trial in the District Court contains, even before the By-Laws

themselves, four "Declarations of External Policy" adopted by the membership as represented in national convention. These resolutions support a balanced budget, a fund drive to fight muscular dystrophy and juvenile diabetes, legislation to permit "voluntary prayer in American schools," and the economic development of Alaska. All of these propositions, except the second one, relate to highly controversial political questions. The prayer policy recites, for example, that "the framers of our Constitution never meant for [sic] federal restrictions on free exercise of religious practice or speech" and that "[t]he United States Jaycees is built on a foundation of faith, as witnessed by the first line of the Jaycee Creed, 'We believe that faith in God gives meaning and purpose to human life.' "

Over the years, the national organization has taken stands in favor of the draft, the efforts of the FBI "to eliminate disloyalty" in this country before World War II, the formation of the United Nations, an increase in the corporate income tax, the recommendations of the Hoover Commission on reorganization of the federal government, the ratification of the Panama Canal Treaty, the 18-year-old vote, the vote for citizens of the District of Columbia, the "defense of freedom" in Vietnam, and (apparently at a later time) the withdrawal of U.S. troops from Southeast Asia. It has opposed "one-man" congressional committees, "socialized medicine," federal funds for teachers' salaries and school construction, and pornography. More recently, the Jaycees has embarked on a nation-wide program in support of President Reagan's economic policies, called "Enough is Enough," and it has advocated passage of a bill to limit the appellate jurisdiction of the Supreme Court in cases involving "voluntary

prayer." Local and state groups have also taken political stands. Sixteen state organizations have asked their respective legislatures to join in calling a constitutional convention to adopt a balanced-budget amendment to the Constitution of the United States—an activity within the most literal reading of the Assembly Clause of the First Amendment. State and local Jaycee groups have advocated a reduction in the size of the Minnesota Legislature, a bill to save seals, and a change in the form of city government in El Dorado, Arkansas. These and similar actions are reported from time to time in a magazine called *Future*, published by the Jaycees.

The Jaycees is not a political party, or even primarily a political pressure group, but the advocacy of political and public causes, selected by the membership, is a not insubstantial part of what it does. Further, all of its doings are colored by the adoption and recitation at meetings of the Jaycee "Creed," quoted *ante* at 4, which espouses "faith in God" and "free enterprise" and declares that "the brotherhood of man transcends the sovereignty of nations." Most Americans may regard these sentiments as no more than pious platitudes, but they nonetheless have a distinct ideological content. Some people do not believe in God; some do not agree that "free enterprise" is the best way to win "economic justice," and some care more about "the sovereignty of nations," or a particular nation, than they do about "the brotherhood of man." Those who join the Jaycees identify themselves, emotionally and philosophically, with the beliefs expressed in this Creed. The same cannot be said of Dale Carnegie and similar self-improvement enterprises.

We conclude that a good deal of what the plaintiff does indisputably comes within the right of association, even as limited to association in pursuance of the specific ends of

speech, writing, belief, and assembly for redress of grievances. That there is a right involved, however, does not get the plaintiff all the way to the legal haven where it would be. Even First Amendment rights, the Supreme Court has often held, must yield at times to state interests, just as that "liberty" which the Due Process Clause protects is not insulated from every assault of government, but only from deprivation "without due process of law." We turn, therefore, to consideration of the degree to which the State wishes to interfere with the plaintiff's right of association, and of the nature of the State interest advanced to support the challenged interference.

C.

There are a number of ways in which government may seek to abridge the freedom of association. It may directly punish the act of membership; it may intrude upon the group's internal organization or integral activities; it may withhold a benefit or privilege from members of the association; or it may compel disclosure of the fact of membership. See Tribe, *American Constitutional Law* 703 (1977). The validity of a particular abridgement-in-fact can be determined only after a careful analysis of the extent and nature of the abridgement, the state interest asserted to justify the abridgement, the extent to which this interest will be impaired if the abridgement is set aside by the courts, and the extent to which this interest can be vindicated in less intrusive ways. All of these factors, and the balance among them, must be considered. None of them, considered in isolation, will be dispositive. As, for example, the type of abridgement grows more burdensome, the state interest may need to be relatively more compelling in order to sustain it. The inquiry is inescapably somewhat imprecise, and for that rea-

son may not be so satisfying, and will not be so logically demonstrable, as the answers to some other kinds of legal questions. But it must nevertheless be undertaken.

The abridgement at issue here is of the second type listed above. Government asserts the power to determine who shall be eligible for membership in the Jaycees. This kind of assertion of state power is not often encountered. It goes to the heart of the kind of association that plaintiff has had and desires to continue, an association for the advancement of the interests of young men. If the statute is upheld, the basic purpose of the Jaycees will change. It will become an association for the advancement of young people. Young men will no longer be its only beneficiaries. It is natural to expect that an association containing both men and women will not be so single-minded about advancing men's interests as an association of men only. Moreover, government will be deciding the membership of a group one of whose major activities is to petition the government for redress of grievances. It is true enough that the specific content of most of the resolutions adopted over the years by the Jaycees has nothing to do with sex. Men are no more likely than women, as such, to favor the United Nations or a balanced budget. But some change in the Jaycees' philosophical cast can reasonably be expected. It is not hard to imagine, for example, that if women become full-fledged members in any substantial numbers, it will not be long before efforts are made to change the Jaycee Creed. Young women may take a dim view of affirming the "brotherhood of man," or declaring how "free men" can best win economic justice. Such phrases are not trivial. The use of language betrays an attitude of mind, even if unconsciously, and that attitude is part of the belief and expression that the First Amendment

protects. An organization of young people, as opposed to young men, may be more "felicitous," more socially desirable, in the view of the State Legislature, or in the view of the judges of this Court, but it will be substantially different from the Jaycees as it now exists.

The State emphasizes, and rightly, that the Jaycees is not an intimate group. It has about 300,000 members nationwide, and there is no evidence in this record that any particular man who wanted to be a member has ever been rejected. On one occasion new members were even sought door-to-door. So far as the national By-Laws are concerned, members need only be male, between 18 and 35 years of age, and willing to pay the first year's dues (in the neighborhood of $25). This is hardly a private club, in the customary sense of that word, and it is certainly not "exclusive." There is a sense in which the word "public" is justly used of such an organization. We have no doubt that if the Jaycees operated a swimming pool, a bar, or a restaurant, the facility would have to be open to women as well as men. See, *e.g.*, *Tillman v. Wheaton-Haven Recreation Ass'n*, 410 U.S. 431 (1973); *United States v. Trustees of the Fraternal Order of Eagles*, 472 F. Supp. 1174 (E.D. Wis. 1979).

But more is at stake here than swimming, food, or drink. The Jaycees is a genuine membership organization, whose members govern its affairs and decide its policies, not just a vehicle for the delivery of commercial goods and services. Furthermore, the state has overstated to some extent the degree to which membership is open to young men indiscriminately. The eligibility criteria we have discussed up to now are all in the national By-Laws. Local chapters are free, to some extent, to impose other requirements, and the St. Paul chapter has done so. (No one may be a member of the

national group without being a member of a local chapter.) The St. Paul By-Laws require that applicants be of "good character and reputation." I H.E. Tr. 184.[7] No one has ever been rejected under that clause, but "[u]nder the appropriate circumstances," *ibid.*, someone could be. In addition, walk-in applicants are rare. *Id.* at 144. One important means of recruitment is individual contacts between existing members "and friends or acquaintances of theirs or people they run into." *Ibid.* Perhaps for this reason, the membership is homogeneous to a substantial degree. About 30 per cent of the members of the Minneapolis chapter are "upper management," and perhaps another 20 per cent are "middle management," although far less than half the population from which members are drawn are involved in either middle or upper corporate management. *Id.* at 148. Recruitment for membership in the Minneapolis Jaycees is not held out "to all members of the public." *Ibid.* Of the St. Paul chapter, about 60 per cent of the members are in "corporate management," *id.* at 183, and no more than five members out of about 400 work in government, although of all the communities in Minnesota, St. Paul presumably "is the most heavily populated by Government employees." *Id.* at 183-84. There is, in other words, a certain *de facto* process of selection at work here. The Jaycees is not exclusive or private, in the sense of small or intimate; but neither is it a cross-section of the community, even of the young male community.

We next examine the nature of the interference with the Jaycees' membership practices that state policy would produce. The intrusion is both direct and substantial. The State is not merely making the Jaycees' desired policy more dif-

[7] This reference is to Volume I of the Transcript of the hearing before the hearing examiner, held on April 23, 1979.

ficult, or more expensive. We have here no mere disclosure law, no simple withholding of state favor or benefits. The membership practice at issue is directly prohibited. The Jaycees' membership policy will have to be changed, if the State statute is upheld. If it is not, every person responsible, including those who aid or abet the violation, will be guilty of a misdemeanor, Minn. Stat. Ann. §363.101 (West Cum. Supp. 1983). In addition, if the Jaycees fails to comply, the Commissioner of the Department of Human Rights may apply to a state district court for an order directing compliance, Minn. Stat. Ann. §363.091 (West Cum. Supp. 1983), and violation of such a court order would presumably be punishable as a contempt. Furthermore, it is not clear that the effect of the Department of Human Rights' cease-and-desist order can be avoided simply by withdrawing from the State of Minnesota. In theory, the Jaycees can choose to leave the state; but the order may mean that they may not do so for the purpose of preserving their preferred membership policy, and there is no reason to suppose that they would ever wish to do so for any other reason.

The defendants assert that the state interest involved is "compelling" enough to override whatever right of association plaintiff possesses in its male-only membership policy. The state interest—"preventing discrimination in public accommodations on the basis of sex," *United States Jaycees v. McClure*, 534 F. Supp. 766, 771 (D. Minn. 1982)—is certainly "compelling" in the general sense of that word. To clear the channels of commerce of the irrelevancy of sex, to make sure that goods and services and advancement in the business world are available to all on an equal basis, without regard to immaterial personal characteristics—these are public purposes of the first magnitude. But whether the

asserted interest is "compelling" in a particular set of circumstances, whether the interest is "compelling" *enough* to override the right asserted, is a question that requires, we think, a more particularized analysis.

Here, upholding the claimed right of association would impair the asserted compelling state interest, but only to a limited extent. Places of public accommodation in the ordinary sense of business establishments at which goods and services are sold to the public would continue to be subject to the full vigor of the law. So would the Jaycees, insofar as any of their community activities, sales of goods, or employment practices are concerned. All of these activities would be free of discrimination in the future, as (so far as the record before us shows) they have been in the past. It is only the Jaycees' membership practices that would be affected if this particular application of the state public-accommodations law is prohibited. In this regard, we think it significant that the state interest being asserted is the interest in freedom from discrimination in public accommodations generally. If we were dealing with a statute that straightforwardly forbade membership discrimination in groups of more than a certain size that derived a substantial amount of support from business, or if the record showed that membership in the Jaycees was the only practicable way for a woman to advance herself in business or professional life, a different sort of weighing would have to take place, and such a statute might be upheld. But that is not this case. We know that some of the Jaycees' support comes from businesses which pay dues for their employees, but we do not know how much, either in absolute dollars or as a share of the Jaycees' total dues income. We know that membership in the Jaycees has been of some help to the com-

plaining individuals in their corporate careers, but we do not know whether similar organizational experience in other clubs or associations, open either to both sexes or to women only, has been or could be of similar or greater help to these or other women. Either a legislative or a judicial record illuminating these and similar questions of fact would have been of substantial use to the state in this case.

Other factors also dilute somewhat the force of the state's interest here. The Jaycees is the only group whose membership practices have ever been subjected to this law. Yet, there are hundreds of private (in the sense of nongovernmental) associations in this country whose membership is limited either to men or to women. See Gale, *Encyclopedia of Private Associations* (16th ed. 1981).[8] Some of these groups seem pretty close to the Jaycees, and yet the Supreme Court of Minnesota has held that the law does not apply to one of them, the Kiwanis. Of this, more hereafter in Part III of this opinion, in which we deal with the vagueness argument. We mention the point here only because an asserted state interest that is being applied only selectively appears to that extent weaker than a state policy applied consistently and across the board.

Finally, there are other ways in which the state can express its displeasure with the Jaycees' discriminatory membership practice, ways less directly and immediately intrusive on the freedom of association than an outright prohibition enforced or enforceable by the criminal law. State officials could be instructed not to appear at any function of any discriminatory club, not to do any business with such a

[8] A previous edition of this treatise was introduced into evidence at trial, but it was not made available to us as part of the Designated Record.

club, and to give no official recognition to it. State officials and employees, at least those above a certain level, could be instructed not to join such a club. Those who seek public office or preferment may validly be required to accept it *cum onere*, to divorce themselves from groups or activities that indulge in invidious discrimination. Any state tax concessions, *e.g.*, the deduction for charitable contributions, could be withdrawn. It could also be made unlawful (indeed, it may be already) for an employer to subsidize an employee's membership in any discriminatory club, or to give that membership any favorable weight in deciding whether to promote an employee. We cannot say that these measures, less direct than the flat prohibition before us in this case, would be just as effective in eliminating discrimination. Probably they would not be. The record simply does not answer that question. But the existence of less intrusive means for effectuating state policy, even if less than completely effective, is still a relevant factor. At some point the right of association claimed may be so strong, and the state interest asserted comparatively so weak, that the existence of somewhat less effective alternative means may be enough to tip the constitutional balance against the state.

Obviously these are questions of degree. The lines are not always clear, just as the line is not always clear between collective-bargaining activities, for which members of the bargaining unit, whether or not they are members of the union, may be compelled to contribute, "and ideological activities unrelated to collective bargaining, for which such compulsion is prohibited." *Abood v. Detroit Board of Education*, 431 U.S. 209, 236 (1977). The degree of constitutional protection to which certain conduct is entitled becomes progressively greater as the element of "speech" or

"expression" grows, and that of "act" or "conduct" increases. It becomes progressively less as the speech begins to appear more "commercial." Despite the imprecision of these categories, "a court may not escape the task of assessing the First Amendment interest at stake and weighing it against the public interest allegedly served by the regulation." *Bigelow v. Virginia*, 421 U.S. 809, 826 (1975). In determining how the balance should be struck here, we turn to an examination of certain cases claimed by one side or the other to be persuasive.

D.

The parties refer us to various opinions of the Supreme Court that are claimed to support their positions. Plaintiff stresses the following passage from a dissenting opinion of Justice Douglas, joined by Justice Marshall, in *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 179-80 (1972) (footnote omitted):

> My view of the First Amendment and the related guarantees of the Bill of Rights is that they create a zone of privacy which precludes government from interfering with private clubs or groups. The associational rights which our system honors permit all white, all black, all brown, and all yellow clubs to be formed. They also permit all Catholic, all Jewish, or all agnostic clubs to be established. Government may not tell a man or woman who his or her associates must be. The individual can be as selective as he desires. So the fact that the Moose Lodge allows only Caucasians to join or come as guests is constitutionally irrelevant, as is the decision of the Black Muslims to admit to their services only members of their race.

It also cites the concurring opinion of Justice Goldberg, joined by Warren, C.J., and Douglas, J., in *Bell v. Maryland*, 378 U.S. 226, 286, 313 (1964):

> Prejudice and bigotry in any form are regrettable, but it is the constitutional right of every person to close his home or club to any person or to choose his social intimates and business partners solely on the basis of personal prejudices including race. These and other rights pertaining to privacy and private association are themselves constitutionally protected liberties.

We cannot agree that these passages are of much help, despite our respect for the authors. For one thing, they appear in separate opinions, not opinions of the Court. And for another, it is not clear to us that the Jaycees is a "private club" in the sense in which that phrase is used in the opinions cited. In *Moose Lodge* the opinion of the Court described Lodge No. 107 as "a private club in the ordinary meaning of that term," 407 U.S. at 171, and noted that it had "well-defined requirements for membership." *Ibid.*[9] The Jaycees' membership requirements may be less restrictive than those of the Moose Lodge. Our holding above that the Jaycees have a constitutionally protected right of association turns more on the presence of traditional First Amendment activity such as speech and advocacy of public causes, than on notions of privacy or intimacy.

Defendants refer us to *Norwood v. Harrison*, 413 U.S. 455, 470 (1973), where the Court said that "[i]nvidious

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[9] *But cf. Commonwealth Human Relations Comm'n v. Loyal Order of Moose*, 448 Pa. 451, 294 A.2d 594 (1972) (the Moose Lodge is a "place of public accommodation" under a Pennsylvania statute, 43 Pa. Stat. §954; dining room may not refuse a member's black guest; but discrimination as to membership itself is not forbidden, 294 A.2d at 598-599).

private discrimination may be characterized as a form of exercising freedom of association protected by the First Amendment, but it has never been accorded affirmative constitutional protections." But that phrase appears in the course of an opinion invalidating the provision by a state of textbooks to a discriminatory school. The context—affirmative aid by the state to a discriminatory activity—is quite different from the present case. The Court's holding had only the effect of withdrawing official sanction from discrimination.

Runyon v. McCrary, 427 U.S. 160 (1976), is probably stronger authority for the defendants here. That case holds that 42 U.S.C. §1981 prohibits a private school from excluding students on the basis of race. The school was commercially operated and advertised broadly for applicants without in any way implying that all races would not be equally welcome. After holding that §1981 applies to this kind of conduct, the Court went on to reject the school's claim that the statute, as so applied, violated the First Amendment right of association. The Court quoted the passage from *Norwood v. Harrison, supra*, which we have already described, and then added that the school had not shown that the admission of black students would in any way inhibit the teaching of any ideas or dogma. 427 U.S. at 176.

We believe *Runyon* is not in point, for several reasons. The Court was careful to state, at the outset of its opinion, that the cases before it "do not present any question of the right of a private social organization to limit its membership on racial or any other grounds." 427 U.S. at 167 (footnote omitted). The Jaycees may not be "private" or "social" in quite the sense that the *Runyon* Court used those terms,

but it comes closer to those categories than a school that holds itself out as willing to sell its services to any member of the public. Moreover, admission of a student to a school has nothing necessarily to do with the school's own internal governance. Nonpublic schools are governed by their owners or boards of trustees, not by a vote of the student body. The Jaycees, on the other hand, is governed by its members and their elected representatives, and a change in the makeup of the membership could well result in a change in the ideas or dogma that the organization propagates. Furthermore, a student at a school is a consumer of educational services. The school does not normally take positions on public issues, or have a "Creed," or ask the government, state or federal, for redress of grievances. Members of the Jaycees receive educational services, in a sense, in the form of leadership training and experience, but they do much more than that, as we have tried to illustrate earlier in this opinion. *Runyon* is not controlling, though it may help the defendants here more than it does the plaintiff.

A closer case, in some ways, is *Railway Mail Ass'n v. Corsi*, 326 U.S. 88 (1945). A New York statute prohibited labor organizations from denying membership to anyone on account of race, color, or creed. The Railway Mail Association, an organization of postal clerks, limited membership to males of the Caucasian or native American Indian race. The association argued that the statute violated the Fourteenth Amendment "as an interference with its right of selection to membership and abridgement of its property rights and liberty of contract." *Id.* at 93. The controversy had arisen when a branch association attempted to admit persons not of the Caucasian race. *Id.* at 93 n.10. The Supreme Court upheld the state law. It noted, among other things, "that the

terms imposed by a dominant union apply to all employees, whether union members or not." *Id.* at 94. And therein lies the crucial distinction between *Corsi* and this case. We do not for a moment doubt the validity of a law, state or federal, forbidding sex as well as race discrimination by unions. Indeed, federal law now does just that. 42 U.S.C. §2000e-2(c)(1). But unions are not the Jaycees. The consequence of being excluded from a union, for a person who must work under an agreement between the union and the employer, is much more severe than the consequence of being excluded from any other group that does not have the quasi-governmental power to affect non-members through collective bargaining.[10]

In short, our decision is not controlled by precedent. We must look to principle and reason. Several factors are important to our analysis. The regulation at issue here, though not overtly related to the content of what the Jaycees are saying, nevertheless has the potential of changing that content, because it purports to specify, in one respect at least,

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[10] We note briefly certain other cases of peripheral relevance. *National Org. for Women v. Little League Baseball, Inc.*, 127 N.J. Super. 522, 318 A.2d 33 (1974), *aff'd mem.*, 67 N.J. 320, 338 A.2d 198 (1974), held that Little League baseball is a "place of public accommodation" within the meaning of N.J. Stat. Ann. §10:5-12(f). No First Amendment or freedom-of-association argument was made, and the Court noted that the Little League could withdraw from New Jersey, if it wished, in order to avoid letting girls play baseball as well as boys. *B.P.O.E. Lodge No. 2043 v. Ingraham*, 297 A.2d 607 (Me. 1972), *appeal dismissed for want of a substantial federal question*, 411 U.S. 924 (1973), upheld 17 Me. Rev. Stat. Ann. §1301-A, forbidding racial discrimination by any person holding a liquor license or a license to serve food. The Maine court's opinion notes that the statute does not forbid discrimination in membership; it simply forbids the sale of liquor and food by those who do discriminate.

the identity of those who may be Jaycees, and who therefore determine the content of what Jaycees say. Speech and advocacy are not the only things Jaycees do, but they are a significant part of it. We are not in the less well protected area of commercial speech. The special tests, easier for the state to pass, that apply in that area come to bear only when speech is "related *solely* to the economic interests of the speaker and its audience." *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of New York*, 447 U.S. 557, 561 (1980) (emphasis supplied). Nor are we dealing with speech that itself proposes an illegal act, as in *Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Rights*, 413 U.S. 376 (1973). The state wants the Jaycees' activities expanded, not forbidden. And, even though we might think that the Jaycees would survive, even be improved, if women were admitted, some scope must be given to the private choice of those who are now in the organization. The right to choose with whom one *will* associate necessarily implies, within some limits, the right also to choose with whom one will *not* associate.

The interest of the state, though compelling in the general sense, will be less seriously impaired than at first appears if this challenged interference is prevented, for reasons we have already explained. And the state has other ways, perhaps less effective, but still powerful, to vindicate its interest. Once a serious incursion on a First Amendment right of association is shown, the normal presumption of constitutional validity is reversed. The state must show that its interference with the claimed right is clearly justified. We are not persuaded that the required showing has been made here, and we therefore hold that the application of the state public-accommodations law to the Jaycees' membership

policies is, in the circumstances of this case, invalid under the First and Fourteenth Amendments.

III.

Plaintiff also claims that the statute is invalid on grounds of vagueness and overbreadth. Either of these doctrines, if applicable, would furnish an adequate and independent basis for invalidating the public-accommodations law as applied to the membership practices of nongovernmental organizations, entirely apart from the invalid-as-applied ground described in Part II of this opinion. At first glance, the statute seems anything *but* vague in the present context. Whatever might have been its initial uncertainty as to the application of the phrase "place of public accommodation," and however startled it may be at that phrase's interpretation by the Supreme Court of Minnesota, the Jaycees now knows that it *is* a "place of public accommodation," and it knows precisely what its legal duties are under the Department of Human Rights' cease-and-desist order, and what the penal consequences may be of violating that order. But the Minnesota Supreme Court, in the course of interpreting the key statutory phrase, has, in our view, introduced such an element of uncertainty as to make it impossible for people of common intelligence to know whether their organizations are subject to the law or not.

The Supreme Court's opinion at first seems to include any large membership organization that aggressively recruits among a broad segment of people—a definition that probably is not vague, though it might raise overbreadth problems, in the sense that some clearly protected activities (*e.g.*, political parties) may be drawn within the zone of prohibition. (We take it, for example, that a single-issue political party devoted to either the passage or the defeat of the

Equal Rights Amendment could assert a well-founded First Amendment right to limit its membership to one or the other sex.) The Supreme Court's opinion then seems to draw back from the full implications of its rationale. It explains that it is interpreting the law to apply only to "public" organizations—like the Jaycees—but not to "private" organizations —like the Kiwanis. Perhaps this passage in the opinion is evidence of the Court's solicitude for the rights of "private" groups, and of a desire to avoid an overbreadth challenge based on the theory that the law, even if valid as to the Jaycees, is invalid on its face because it applies to clearly protected private clubs. An "overbroad" law may be challenged even by a plaintiff whose speech or conduct is not constitutionally protected, if it does not clearly distinguish between speech that is protected and speech that is not. *Cf. Gooding v. Wilson*, 405 U.S. 518 (1972) (Georgia "fighting words" statute invalid because it had not been authoritatively construed not to prohibit protected speech); *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 508 (1982) (White, J., concurring). The difficulty is that in attempting to limit the reach of the law to "public" groups, the state Supreme Court has left us without any discernible standard by which to distinguish "public" from "private." The opinion does not say what it is about the Kiwanis that makes it "private." it says only that the law applies to the Jaycees and not to the Kiwanis. All other groups are left to guess as to whether the law applies to them, and the Jaycees is left to guess as to how it might change itself in order to become "private."

The state answers that the Supreme Court of Minnesota did not really mean to hold that the Kiwanis is "private," and that in fact the record does not contain enough informa-

tion about the Kiwanis to determine what its status is, or how it compares with the Jaycees. We do not so read the Supreme Court's opinion. The relevant passage, 305 N.W.2d at 771, seems clearly to say that the Kiwanis Club is "private" and therefore not subject to the law. The record is hardly full as to the Kiwanis Club and its activities, but the information it does contain seems rather to emphasize the similarities between the Kiwanis and the Jaycees, than the differences. The Kiwanis Club has about 300,000 members nationwide, in about 7,750 local chapters. 1 Gale, *Encyclopedia of Private Associations, supra*, at 783 (16th ed. 1981). It has as broad a range of activities as the Jaycees and competes for "the same class of members," except that the Kiwanis has no upper age limit. Tr. 72.[11] Its membership requirements read as follows:

> Section 4. *Active Membership.*
>
> a. The active membership of this club shall consist of men of good character and community standing residing or having other community interests within the area of this club.
>
> b. The active membership of this club shall be composed of a cross section of those who are engaged in recognized lines of business, vocation, agriculture, institutional or professional life; or who having been so engaged, shall have retired. The number of members in any one given classification shall not exceed twenty percent (20%) of the total active membership.
>
> c. No man shall be eligible to membership in this club who holds membership (other than honorary) in

[11] The reference is to the transcript of the trial before the District Court on August 3, 1981.

any other Kiwanis club or service club of like character.

d. An active member shall pay a membership fee and annual membership dues, and shall be entitled to all the privileges of this club.

At the oral argument the state suggested that membership in the Kiwanis Club is less broadly available than membership in the Jaycees. The language quoted from the By-Laws of the Kiwanis Club fails to demonstrate this claim to our satisfaction. The group of men from which Kiwanians are drawn may be just as numerous as the group from which Jaycees are drawn in practice, especially since there is no upper age limit in the Kiwanis Club. Perhaps Kiwanians do not recruit so aggressively as the Jaycees. We cannot be sure on this record. But the key point is that the Supreme Court's opinion does not identify the facts that served to distinguish the Kiwanis from the Jaycees in its mind, and therefore fails to supply any criterion for distinguishing "private" from "public" groups for purposes of the statute in question. The law, as construed by the Minnesota Supreme Court, simply provides no ascertainable standard for inclusion or exclusion, *Coates v. City of Cincinnati*, 402 U.S. 611, 614 (1971), and is therefore void for vagueness. This conclusion is reinforced by the settled rule that the void-for-vagueness doctrine "demands a greater degree of specificity" in First Amendment cases than in other contexts. *Smith v. Goguen*, 415 U.S. 566, 573 (1974). It is true that the Jaycees knows now that it is subject to the statute, because the highest state court has told it so. But it did not know it when the conduct now said to be illegal began, and it does not know now what it is that makes it "public," as contrasted with the "private" Kiwanis Club. A statute could

perhaps be drafted that would adequately distinguish those categories, but this statute, as interpreted, does not.[12]

IV.

We conclude that the Minnesota public-accommodations law, in the context of the membership practices of non-governmental organizations, is invalid on two alternative and independent grounds: (1) it directly interferes with the Jaycees' First Amendment right of association without sufficient justification; and (2) it is void for vagueness because it supplies no ascertainable standard for the inclusion of some groups as "public" and the exclusion of others as "private." Our holding is a narrow one. The law will continue to apply with full vigor to all business and commercial activity in the usual sense of those words—to businesses, for example, that sell goods and services to the public. It will also apply to those non-membership activities of the Jaycees and other groups that affect the public at large, including the sale of goods, the dispensing of charitable donations, the organization of sporting events, and the like. It is only the law's interference with an organization's choice of its own members that we hold invalid under the First and Fourteenth Amendments.

The judgment of the District Court is reversed, and the cause is remanded to that Court with directions to fashion injunctive relief in favor of the plaintiff consistent with this opinion.

It is so ordered.

LAY, Chief Judge, dissenting.

I respectfully dissent.

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[12] In view of our holding that the law is fatally vague, we do not reach plaintiff's claim of overbreadth.

The attempt of the Jaycees to exclude women from their full membership seeks protection under what I consider to be an outdated rationale of our jurisprudence, one which relegated women to a status inferior to that of men.[1]

I. *Right of Association.*

The majority decision is that the Jaycees' right of association cannot be made subordinate to the State of Minnesota's application of its civil rights act. This view I find to be totally untenable. The court acknowledges that it is within the state's prerogative to make the factual determination as to what may constitute a "place of public accommodation."[2] In all due respect, it seems patently clear, however, that the majority decision rests upon an implied disagreement with the finding of the Minnesota Supreme Court that the

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[1] *See, e.g., Hoyt v. Florida*, 368 U.S. 57, 61-62 (1961) (Florida statute relieving women but not men from jury service not unconstitutional); *Goesaert v. Cleary*, 335 U.S. 464, 466 (1948) (Michigan statute forbidding females to act as bartenders unless the wife or daughter of male owner not violative of equal protection); *Muller v. Oregon*, 208 U.S. 412, 421-22 (1908) (state statute limiting females' workday to 10 hours a day not unconstitutional); *Cronin v. Adams*, 192 U.S. 108, 114-15 (1904) (state may condition issuance of liquor license by prohibiting women from entering place where liquor is sold); *Minor v. Happersett*, 88 U.S. (21 Wall.) 162, 178 (1874) (fourteenth amendment does not confer right to vote on women); *Bradwell v. State*, 83 U.S. (16 Wall.) 130, 138-39 (1872) (federal constitution does not prohibit state from excluding women from the practice of law).

[2] As Judge Arnold says, *supra*, at 12:

> We of course take as a given that the Jaycees is a "place of public accommodation" within the meaning of the Minnesota statute. The Supreme Court of Minnesota has answered that question, and it has the last word. Its "construction fixes the meaning of the statute [and] . . . puts . . . words in the statute as definitely as if it had been so amended by the legislature." *Winters v. New York*, 333 U.S. 507, 514 (1948).

Jaycees is a statutory "place of public accommodation."[3] The majority's analysis is otherwise without much force.

It is true that "mere labels" cannot be used as subterfuge to undermine the proper exercise of constitutional rights. However, there should be little question that a state, as well as the federal government, may provide reasonable restrictions on the exercise of constitutional rights in a "place of public accommodation." *See, e.g.*, 42 U.S.C. §2000a (1976). "Even a ' "significant interference" with protected rights of . . . association' may be sustained if the State demonstrates a sufficiently important interest and employs means closely drawn to avoid unnecessary abridgment of associational freedoms." *Buckley v. Valeo*, 424 U.S. 1, 25 (1976). The validity of substantial burdens on the right to associate is upheld when "they are necessary to further compelling state interests" and are "reasonably taken in pursuit of vital state objectives that cannot be served equally well in significantly less burdensome ways." *American Party v. White*, 415 U.S. 767, 780-81 (1974).

The majority rests its decision on a balancing approach in which the state allegedly has failed to show that its interference with the Jaycees' right to associate is justified. I have great difficulty with the court's reasoning for several reasons.

First and foremost, the majority's conception of the Jaycees is based upon factual error. The majority asserts,

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[3] This is made clear, for example, when the majority says: "The Jaycees may not be 'private' or 'social' in quite the sense that the *Runyon* Court used those terms ['private social organization'], but it comes closer to those categories than a school that holds itself out as willing to sell its services to any member of the public." *Supra*, at 30.

supra, at 21-22, that a prohibition of the Jaycees' sexually discriminatory membership practices

> goes to the heart of the kind of association that plaintiff has had and desires to continue, an association for the advancement of the interests of young men. . . . It is natural to expect that an association containing both men and women will not be so single-minded about advancing men's interests as an association of men only. . . . An organization of young people, as opposed to young men . . . will be substantially different from the Jaycees as it now exists.

Overlooked in recitation, however, is the fact that the Jaycees is not now an association containing only men. It freely admits women, but relegates them to inferior positions within the organization. Women who buy memberships participate in programs with the male members, but unlike men, they are not allowed to vote, hold office, or receive awards. *United States Jaycees v. McClure*, 305 N.W.2d 764, 765 (Minn. 1981).

Moreover, the interests the Jaycees advance are not solely "young men's interests." A glance at the social, civic, and ideological activities of the Jaycees discussed in the majority opinion, *supra*, at 18-20, immediately discloses interests equally applicable to any state citizen, not just young men. The Jaycees operate on the arbitrary sentiment that men have a natural monopoly on such advocacies; this only serves to perpetuate the chauvinistic myth that women are incapable of dealing with such matters.

The majority proclaims that its holding "turns more on the presence of traditional First Amendment activity such as speech and advocacy of public causes, than on notions of privacy or intimacy." *Supra*, at 29. On this basis, the right

of association pertaining to this "place of public accommodation" is elevated to override concededly compelling state interests.[4] Such bootstrapping lacks all potency, however, when the restriction the state seeks to apply does not create any threat to the exercise of the Jaycees' speech and advocacy of public causes. The activities the Jaycees engage in have no relationship to its internal membership practices; an association of men with privileges superior to women does not enhance the effectiveness of the type of advocacy the group has undertaken. *See NAACP v. Alabama*, 357 U.S. 449, 460 (1958). Thus, application of the statute to the Jaycees would not curtail or intimidate any advocacy the association has pursued. *See Runyon v. McCrary*, 427 U.S. 160, 176 (1976); *Buckley v. Valeo*, 424 U.S. at 28-29; *Lucido v. Cravath, Swaine & Moore*, 425 F. Supp. 123, 129 (S.D.N.Y. 1977).

The majority does admit that "[m]en are no more likely than women" to favor certain political issues, but then proceeds to apparently ground its holding on a potential "change in the Jaycees' philosophical cast" since "[y]oung women may take a dim view of affirming the 'brotherhood of man' " or other such expressions contained in the Jaycees' creed. *Supra*, at 22. Such a prediction, however, is unsupported by any factual basis. Many men as well as women believe women should be treated equally in accordance with

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[4] The majority also contends that it is unclear whether the Jaycees can avoid the effect of the Department of Human Rights' cease-and-desist order simply by withdrawing from the state. *Supra*, at 24. I agree with the district court, however, 534 F. Supp. at 772, that the order must be construed according to its intent which was to require the Jaycees to do business in Minnesota in compliance with Minnesota law, if at all.

men.[5] On the other hand, many women oppose certain advances in women's rights.[6] The speculative supposition that the Jaycees' creed "may" change if women are granted equal privileges is a manifestly inadequate basis upon which to deprive the state from enforcing its overpowering interest within this sphere of public accommodations. *See Buckley v. Valeo*, 424 U.S. at 20-23, 25-29; *American Party v. White*, 415 U.S. at 790 (state regulation valid; "absolutely no factual basis" presented in support of claim of undue burden on first amendment rights regulation); *Konigsberg v. State Bar*, 366 U.S. 36, 51-53 (1961); *American Communications Assn. v. Douds*, 339 U.S. 382, 396, 402-04, 406 (1950); *Railway Mail Association v. Corsi*, 326 U.S. 88, 93-94 (1945).

Furthermore, there is no claim or evidence, beyond the disputed membership practices, that any belief expressed in the Jaycees' creed is carried over into affirmative doctrinal advocacy that would be restrained by application of the state statute. The *belief* and the *advocacy* of the "brotherhood of man" and other male-oriented credos, even if intended to connote believed deficiencies of the female gender, would, if threatened, receive robust protection under the first amendment. However, the *conduct* or *practice* of discriminatory treatment in a "place of public accommodation" on the basis of illegal criteria cannot be safeguarded under an asserted constitutional right of association that has, at best, a hypothesized nexus to any deterrence of other protected first amendment rights. *See Runyon v. McCrary*, 427

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[5] For example, many Jaycees' chapters, including the Minneapolis and St. Paul chapters, presumably with large male constituencies, have flouted the national organization's practices which are sexually discriminatory.

[6] This posture is illustrated by the nation's struggles with the Equal Rights Amendment to the United States Constitution.

U.S. at 176; *Railway Mail Association v. Corsi*, 326 U.S. at 93-94; *cf. Norwood v. Harrison*, 413 U.S. 455, 470 n.10 (1973) (Court noted federal law barring discrimination in public accommodations, 42 U.S.C. § 2000a (1976)).

There should be little doubt that a sovereign has a compelling interest in eradicating second-class citizenship in places of public accommodation. The State of Minnesota has decreed that it is an unfair discriminatory practice "[t]o deny any person the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of a place of public accommodation because of . . . sex." Minn. Stat. § 363.03(3) (Supp. 1982). The majority's constitutional argument would make sense if the Jaycees were a private membership organization possessing private associational characteristics. However, it has already been determined otherwise; the Jaycees is a "business . . . facility . . . whose goods, . . . privileges [and] advantages . . . are . . . sold, or otherwise made available to the public." 305 N.W.2d at 766-74; *see* Minn. Stat. § 363.01(18) (Supp. 1982) (statutory definition of "place of public accommodation"). The legislative history and the evidence in the record clearly supports the legal and factual findings reached by the Minnesota court as to the Jaycees.[7]

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[7] The Supreme Court of Minnesota resolved that the Jaycees is a *business* because its members are treated as customers; the product sold is membership in a leadership-training organization. 305 N.W.2d at 768-69. The court found that the Jaycees is a *public*, not private, business because the organization is unselective in those to whom it sells memberships, rewards vigorous recruitment, and strives for unlimited growth. *Id.* at 769-71. The court furthermore decided that both the fixed site of the Jaycees' state headquarters and the mobile sites, including door-to-door solicitation of new members, constitutes public business *facilities* where an unscreened, unselected, and unlimited number of persons are invited. *Id.* at 771-74.

In any event, the court's determination of facts and state law are binding upon us in our task to determine the constitutionality of applying this state law to the Jaycees. *See NAACP v. Button*, 371 U.S. 415, 431-32 (1963); *Railroad Commission v. Pullman Co.*, 312 U.S. 496, 499-500 (1941).

II. *Vagueness.*

The majority concludes that the Minnesota Supreme Court has provided no discernible standard for distinguishing "public" from "private" organizations. This conclusion does not rest on the stipulated definition by the Minnesota Supreme Court of a "public" membership organization, which the majority concedes "probably is not vague," *supra*, at 33-34, but on the unexplained comment in the state court opinion, 305 N.W.2d at 771, that the Jaycees could not "be viewed analogously to private organizations such as the Kiwanis International Organization."

The state determination that the Kiwanis is a "private" association is readily explainable, however, on the basis of the Kiwanis' membership requirements reported in the record and quoted in the majority opinion here. *See supra*, at 35. The Minnesota court denotes as one criterion for the public-private distinction the use of standards in selecting new members and a formal procedure by which membership is restricted. The membership of the Kiwanis group is limited so that the number of members in any one given occupational classification cannot exceed 20% of the total active membership. Such a restriction circumscribes membership boundaries and would serve in itself to make the Kiwanis "private," unlike the Jaycees which has no limiting requirements except for age and sex.

The failure of the Minnesota court to identify specifically this difference between the Kiwanis and the Jaycees which is

apparent in the record cannot justify invalidating the state statute as applied to membership organizations. A developed body of federal and state case law exists which analyzes various characteristics as public or private within the context of public accommodations statutes; the Minnesota court adopted these accepted standards from other courts for the criteria it employed to determine that the Jaycees' memberships are, in statutory terms, "made available to the public." *See* 305 N.W. 2d at 770. Long usage as well as common understanding provides well-defined contours to the public-private distinction the Minnesota court utilized. *See Grayned v. City of Rockford*, 408 U.S. 104, 110-12 (1972); *Law Students Civil Rights Research Council, Inc. v. Wadmond*, 401 U.S. 154, 159 (1971); *cf. NAACP v. Button*, 371 U.S. at 434 (state statute as construed by state court is invalid; statutory definition appeared to depart from common-law concept and state court did not clarify). If a statute can be made constitutionally definite by a reasonable construction, we have a duty to give the statute that construction, *United States v. Harriss*, 347 U.S. 612, 618 (1954); this same requirement should be equally applicable to the words of a state supreme court construing a state statute.[8] *See Winters v. New York*, 333 U.S. 507, 514 (1948). "Condemned to the use of words, we can never expect mathematical certainty from our language." *Grayned v. City of Rockford*, 408 U.S. at 110. *See Broadrick v. Oklahoma*, 413 U.S. 601, 608 (1973).

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[8] As in *United States Civil Service Comm'n v. National Ass'n of Letter Carriers*, 413 U.S. 548, 580 (1973), it is significant that the state legislature has mandated the creation of advisory committees to disseminate technical assistance to interested persons. *See* Minn. Stat § 363.05(17), (20), (21) (Supp. 1982). To remove doubts as to the meaning of the law insofar as the state commission is concerned, advice can be sought on the validity of proposed courses of conduct.

Moreover, even if the outermost boundaries of the public-private distinction is assumed to be imprecise, under accepted principles of constitutional adjudication, the Jaycees, who clearly fit within the definition of a "place of public accommodation," has no standing to challenge the vagueness of this statute as construed and applied to hypothetical organizations not before us. *See Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 495 (1982); *Parker v. Levy*, 417 U.S. 733, 756 (1974).

III. *Overbreadth.*

The majority does not reach the overbreadth issue, but nevertheless insinuates invalidity on this basis of the state statute as construed. As an example that some protected activities may be prohibited, the majority alludes to the right of a single-issue political party, devoted to the passage or defeat of the Equal Rights Amendment, to limit its membership to one gender. *Supra*, at 34. I fail to see how such an illustration is applicable to a statute aimed at "place[s] of public accommodation." Although a political party of this sort may be determined to be "public" under the selectivity and size criteria employed by the Minnesota court, such an association would not fit other requirements of a "place of public accommodation." The hypothetical political party would not be a business offering or selling goods, services, privileges, or advantages, nor could its characteristics possibly be harmonized with other categories within the Minnesota public accommodations law.

Because a statute declared to be overbroad cannot be enforced until narrowed, application of the doctrine is "strong medicine" and is to be used "sparingly and only as a last resort." *Broadrick v. Oklahoma*, 413 U.S. at 613. "[P]articularly where conduct and not merely speech is involved, . . . the overbreadth of a statute must not only be real, but substantial

as well, judged in relation to the statute's plainly legitimate sweep." *Id.* at 615. The potential effect of this statute on protected associational choices is mere speculation. *See id.*; *Ohralik v. Ohio State Bar Association*, 436 U.S. 447, 462 n.20 (1978). In such a situation, "whatever overbreadth may exist should be cured through case-by-case analysis of the fact situations to which its sanctions, assertedly, may not be applied." *Broadrick v. Oklahoma*, 413 U.S. at 615-16.

In conclusion, I find the state statute as construed can be constitutionally applied to the discriminatory membership practices of the United States Jaycees, and is neither vague nor overbroad. I would affirm the decison of the district court.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

Civil No. 4-79-530

THE UNITED STATES JAYCEES, a non-profit Missouri corporation, on behalf of its qualified members,

Plaintiff,

vs.

MARILYN E. McCLURE, Commissioner, Minnesota Department of Human Rights, WARREN SPANNAUS, Attorney General of the State of Minnesota, and GEORGE A. BECK, Hearing Examiner of the State of Minnesota,

Defendants.

MEMORANDUM OPINION
AND ORDER FOR JUDGMENT

CLAY R. MOORE, Esq., Mackall, Crounse & Moore, and CARL D. HALL, JR., Esq., Oral Roberts University Law School, appeared on behalf of plaintiff.

RICHARD L. VARCO, JR., Esq., Special Assistant General for the State of Minnesota, appeared on behalf of defendants.

Plaintiff United States Jaycees (the Jaycees) brought this action against defendants Marilyn E. McClure, Commissioner of the Minnesota Department of Human Rights (the

Department), Warren Spannaus, Attorney General for the State of Minnesota, and George A. Beck, Hearing Examiner for the State of Minnesota, pursuant to 42 U.S.C. § 1983, seeking a judgment declaring Minn. Stat. §§ 363.01(18), and 363.03(3), (6), and (7) unconstitutional and enjoining enforcement thereof, as well as "such costs, attorneys fees and damages as may be proven and allowable." Jurisdiction is alleged under 28 U.S.C. §§ 1331, 1332, and 1343.

Trial was had on August 3, 1981; counsel were given leave to file post trial briefs, and final arguments were heard on January 27, 1982, when the matter was taken under advisement. Based upon the evidence adduced at trial, and all the files, records, and proceedings herein, the court now makes the following findings of fact and conclusions of law in memorandum form.

Procedural Background

This case arose from complaints brought by individual members of the Jaycees. On December 14, 1978, four members of the St. Paul chapter of the Jaycees, including its president, filed a charge of discrimination with the Department, based on the Jaycees' policy of forbidding women the same membership status in the Jaycees as men. On December 19, 1978, four members of the Minneapolis chapter of the Jaycees, including its president, filed a similar charge. The Department investigated and found probable cause to believe the Jaycees had violated Minn. Stat. §§ 363.03(3), (6), and (7)[1] and served notice of the finding and an order for a

[1] § 363.03(3) provides in relevant part:

> It is an unfair discriminatory practice: To deny any person the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of a place of public accommodation because of . . . sex . . .

hearing. The Department's attempts to conciliate the matter failed.

The Jaycees filed an action in this court on February 27, 1979, seeking the same relief it now requests but asking the court to abstain from a determination of the merits of the constitutional claims until the conclusion of administrative proceedings before the Department. The district court[2] dismissed the action without prejudice to renewing the action if the Jaycees received an adverse determination in the state administrative proceeding.

After a hearing, the State Hearing Examiner,[3] issued findings and conclusions which stated that the Jaycees is a place of public accommodation as defined by Minn. Stat. § 363.01(18),[4] and that by subjecting its Minneapolis and St. Paul chapters to sanctions and warning them of an intended vote on revocation of their charters because of their admission of women as individual or regular members, it committed an unfair discriminatory practice in violation of Minn. Stat. § 363.03(3). The hearing examiner, pursuant to

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§ 363.03(6) forbids intentionally aiding, abetting, or coercing another to engage in any of the practices forbidden by the Human Rights Act.

§ 363.03(7) forbids reprisals for opposing or filing a charge concerning any practices forbidden by the Act.

[2] The Honorable Miles W. Lord presiding.

[3] Defendant George A. Beck.

[4] § 363.01(18) provides:

> "Place of public accommodation" means a business, accommodation, refreshment, entertainment, recreation, or transportation facility of any kind, whether licensed or not, whose goods, services, facilities, privileges, advantages or accommodations are extended, offered, sold, or otherwise made available to the public.

Minn. Stat. § 363.071(2),[5] issued a cease and desist order enjoining the Jaycees from 1) revoking the charter of, denying the privilege or right of membership to, or otherwise discriminating against any local chapter or state organization of the Jaycees within Minnesota for extending to women all the rights and privileges of individual or regular membership, or 2) discriminating on the basis of sex against any member or applicant for membership in a Jaycees local chapter within Minnesota with respect to the terms, conditions, or privileges of membership in the local chapter, state organization, or the Jaycees.

The Jaycees then filed the present action. At the request of the parties this court certified the following question to the Minnesota Supreme Court pursuant to Minn. Stat. § 408.061 (3):

> Is The United States Jaycees a "place of public accommodation" within the meaning of Minn. Stat. § 363.01 Subdivision 18?

By stipulation, the parties agreed that the evidentiary facts relevant to the certified question were those contained in the findings of fact of the hearing examiner and the transcript and exhibits in the record of the state administrative proceeding. The supreme court answered the question in the affirmative. *United States Jaycees v. McClure*, 305 N.W. 2d 764, 765 (Minn. 1981).

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[5] § 363.071(2) provides in relevant part that

> if the hearing examiner finds that the respondent has engaged in an unfair discriminatory practice, the hearing examiner shall issue an order directing the respondent to cease and desist from the unfair discriminatory practice found to exist and to take such affirmative action as in the judgment of the examiner will effectuate the purposes of this chapter . . .

The Minnesota Supreme Court reviewed the legislative history of Minn. Stat. §§ 363.01 and 363.03, as well as the characteristics and practices of the Jaycees. The court concluded that the Jaycees is a place of public accommodation as defined by the legislature in § 363.01(18) because: 1) the Jaycees is a "business" in that it sells goods and extends privileges in exchange for annual membership dues; 2) it is a "public" business in that it solicits and recruits dues paying members but is unselective in admitting them, and 3) it is a public business "facility" in that it continuously recruits and sells memberships at sites within the State of Minnesota. *Id.* at 768.

Issues presented

The Jaycees contends that the actions of the State of Minnesota and the Minnesota Supreme Court deprive it and its members of the right of freedom of association guaranteed by the First and Fourteenth Amendments of the United States Constitution and that the Minnesota statutes, as applied, are unconstitutionally vague and overbroad.[6]

Facts

The factual record before this court is essentially the same as that before the Minnesota Supreme Court although additional evidence was introduced here. The record consists of the hearing examiner's findings and conclusions, the transcript and record of the state proceedings, the testimony of Arthur W. Boutiette, Executive Vice President of the Jaycees and the organization's historian, exhibits offered during his direct examination, and certain additional exhibits. Having carefully reviewed the reocrd, the court

[6] In its complaint the Jaycees also alleged a violation of the Equal Protection Clause, but it has chosen not to pursue that claim.

adopts the factual statements of the Minnesota Supreme Court as augmented by its own findings.

The Jaycees is a non-profit corporation, exempt from federal income taxes. It has received no federal funds since 1977 and has never received state funds. There are 51 state organizations affiliated with the Jaycees and approximately 8,800 local Jaycee chapters. Membership in a local chapter automatically enrolls the member in the state and national chapter.

The Jaycees considers itself to be a young men's leadership training organization, serving the goals of individual development, community development, and development of management ability.[7] It claims that the training it offers gives members an advantage in business and civic advancement, and businesses are in fact sometimes requested to pay the dues for individual members. The Jaycees provides its local chapters with programs and materials relative to its stated goals. These include, for example, a personal dynamics program, a public speaking program, Junior Athletic Championships, leadership dynamics materials, and the like. In addition, the Jaycees from time to time issues various policy statements on political and social issues after taking votes of its members either by national referendum or through votes of delegates at national conventions.

One of the major activities of the Jaycees is the sale of memberships in the organization. It encourages continuous

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[7] The Jaycees bylaws state that it is organized to

> promote and foster the growth and development of young men's civic organizations in the United States, designed to inculcate in the individual membership of such organization a spirit of genuine Americanism and civic interest, and as a supplementary education institution to provide them with opportunity for personal development and achievement . . .

recruitment of members with the expressed goal of increasing membership and offers no selection criteria for members, save age and sex. It was primarily on the basis of the manner of the Jaycees sale of memberships that the Minnesota Supreme Court concluded it was a public accommodation as defined in Minn. Stat. § 363.01(18). The Jaycees itself refers to its members as customers and membership as a product it is selling. More than 80 percent of the national officers' time is dedicated to recruitment, and more than half of the available achievement awards are in part conditioned on achievement in recruitment. The Jaycees discourages selective recruitment of members, preferring a high quantity of new recruits. The Executive Director for the affiliated organization of Minnesota has stated that he had no knowledge of a rejection of any application for membership.

The Jaycees has a policy which admits women to membership but does not afford them the same privileges enjoyed by male members. Men, ages 18 to 35, may become individual members, whereas women may be offered only associate memberships. Annual membership dues are only slightly less for associate membership. Associate members are not allowed to stand or be nominated for office, vote in the election of officers, vote in matters of decision in the local, state, or national organizations, or receive achievement awards. They are allowed, however, to participate in and contribute to the success of the programs upon which such awards are based. Men can continue to receive awards after age 35, even though they may then purchase only associate memberships.

The Minneapolis and St. Paul chapters of the Jaycees have disagreed with this policy. In 1974 and 1975 they be-

gan to allow women to purchase individual memberships and accorded them the same privileges as male members. On the national level, the Jaycees voted down an amendment to its bylaws that would allow women to buy individual memberships, but set up a "pilot membership program" which allowed local chapters in five states to offer individual memberships to women. In June of 1978, the Jaycees ordered the pilot membership program terminated and again rejected a change in policy to allow women the same membership status as men. Then in 1981, Jaycees members voted in a national referendum not to change the membership status of women, 67 percent voting against the change and 33 percent for.

From 1975 to June of 1978, the Minneapolis chapter was subjected to sanctions for violation of the Jaycees bylaws restricting individual memberships to men. The sanctions included exclusion of the chapter members' votes when computing votes at the national level, disallowing the chapter members from running for state or national office, and declaring the chapter ineligible to host national events.

On December 15, 1978, the Jaycees advised the Minneapolis and St. Paul chapters it planned to vote on whether to revoke their charters because they had violated the bylaws by continuing to afford women equal privileges with men. This occurred on the day after members of the St. Paul chapter filed their complaints with the Department.

Discussion

The parties recognize that the Minnesota Supreme Court's interpretation of Minn. Stat. § 363.01(18) represents an authoritative construction of that section and is binding on this court. *N.A.A.C.P. v. Button*, 371 U.S. 415, 432 (1963). The only question before this court therefore is whether

the application of the statute to the Jaycees violates its constitutional rights.

1. *Freedom of association*

The Jaycees claims that the application of the Minnesota Human Rights Act to it deprives it of the right to "associate for the purpose of advancing only the interests of young men." This deprivation is alleged to have taken place absent any compelling state interest.

The only First Amendment interest articulated by the Jaycees is freedom of association. It is questionable whether association not directed at the exercise of other First Amendment rights enjoys constitutional protection. *See* L. Tribe, *American Constitutional Law*, at 702 (1976). Supreme Court cases upholding a right of freedom of association have involved association in connection with other protected First Amendment activities. *See, e.g., Widmar v. Vincent*, 102 S.Ct. 269, 276 (1981); *Abood v. Detroit Board of Education*, 431 U.S. 209, 235 (1977); *N.A.A.C.P. v. Alabama*, 357 U.S. 449, 462 (1958). Certain language in decisions of this circuit, however, suggests that freedom of association itself may be a "basic constitutional freedom." *Norbeck v. Davenport Community School District*, 545 F.2d 63, 67 (8th Cir. 1976). *See Greminger v. Seaborne*, 584 F.2d 275, 278 (8th Cir. 1978); *American Federation of State, County and Municipal Employees v. Woodward*, 406 F.2d 137, 139 (8th Cir. 1969) ("The First Amendment protects the right of one citizen to associate with other citizens for any lawful purpose free from government interference."). The Fifth Circuit has held the right of social association itself to be constitutionally protected. *See Aladdin's Castle, Inc. v. City of Mesquite*, 630 F.2d 1029, 1041-1042 (5th Cir. 1980), *rev'd on other grounds*, 50 U.S.L.W. 4210 (1982).

The court need not, however, reach the issue of whether association is itself protected by the First and Fourteenth Amendments. Application of other constitutional principles shows that if there is such a right, it has not been unconstitutionally denied to the Jaycees.

The Jaycees is not afforded affirmative constitutional protection for its practice of distinguishing the rights and privileges of men and women members. "Invidious private discrimination may be characterized as a form of exercising freedom of association . . . but it has never been accorded affirmative constitutional protections." *Norwood v. Harrison*, 413 U.S. 455, 470 (1973). While the Jaycees has a right to believe that its organization should only advance the interests of men, its practice of excluding women from equal benefits does not enjoy protection under the cirucmstances presented. *See Runyon v. McCrary*, 427 U.S. 160, 176 (1976).

Even assuming the Jaycees' membership policy constituted an exercise of a protected right to associational freedom, the state has shown a sufficiently compelling interest to overcome such a right. The right to associate is not absolute; even a significant interference with the right of association may be sustained if the state demonstrates a sufficiently important interest and avoids unnecessary abridgment of First Amendment rights. *Buckley v. Valeo*, 424 U.S. 1, 25 (1976).

Minnesota has demonstrated its commitment to prohibiting discrimination in access to public accommodations on the basis of sex. Its legislature has clearly stated that "it is the public policy of this state to secure for persons in this state, freedom from discrimination . . . in public accommodation because of . . . sex . . ." Minn. Stat. § 363.12. The vehicle it has chosen to accomplish this purpose is the Minnesota

Human Rights Act, including the provisions at issue in this case.

The legislative history of the act shows the legislative intent and policy behind its prohibitions. That history was set forth in the Minnesota Supreme Court's opinion answering this court's certified question and was the foundation for its analysis. Minnesota has had a law barring racial discrimination in accommodations since 1885, and its coverage has been expanded from time to time since then. Discrimination in public accommodations on the basis of religion and national origin was prohibited in 1943, and on the basis of sex in 1973. The definition of public accommodations has been enlarged and simplified, and ultimately in 1967 came to be focused on a business facility of any kind and "*conduct* in which discrimination would be prohibited" (*United States Jaycees v. McClure*, 305 N.W.2d at 768) rather than on a particular site.[8] The legislature itself declared that the statute should be construed liberally to accomplish its purpose (Minn. Stat. § 363.11) which is to protect the citizens of Minnesota from discrimination (§ 363.12). On this background the court concluded that the legislature had shown "its own special and unusually broad definition of the term 'public accommodation.'" 305 N.W.2d at 766.

Minnesota's interest in preventing discrimination in public accommodations on the basis of sex is compelling. Sex discrimination has been prohibited in some cases by the courts, *see e.g., Frontiero v. Richardson*, 411 U.S. 677, 688

[8] Minnesota's statutory definition of public accommodation is significantly different than that of the District of Columbia, making *United States Jaycees v. Bloomfield*, Case No. 79-1141 (D.C. Aug. 31, 1981), of little or no value in deciding the issues before this court.

(1973), and by the United States Congress, *see e.g.*, 42 U.S.C. § 2000e-2 (forbidding discrimination in employment on the basis of sex). Such statutory provisions do not run afoul of the First Amendment. *See Norwood v. Harrison*, 413 U.S. 455, 470 (1973). Similarly, Minnesota's decision to forbid sex discrimination in public accommodations by use of a carefully drawn statute does not violate the First Amendment. The statute's focus on commercial activity, which occupies "a subordinate position on the scale of First Amendment values . . ." (*Ohralik v. Ohio State Bar Association*, 436 U.S. 447, 456 (1978)), further supports this conclusion.

It is the policy of the State of Minnesota set by its elected representatives in its civil rights statute to prohibit sex discrimination to the same extent as racial discrimination. The Minnesota Supreme Court commented that if the Jaycees were discriminating on the basis of race, it would have no difficulty in holding that such action was barred by the statute, and the fact that the discrimination is on the basis of sex should not lead to a different result. 305 N.W.2d at 774. Protection of citizens from discrimination on the basis of sex is a legitimate interest of the State of Minnesota which it has chosen to value highly. Its statutory scheme does no more than require that those organizations which are by their nature public accommodations and which choose to do business in Minnesota offer such accommodations on a nondiscriminatory basis.

Contrary to the Jaycees' contention that its purpose would be destroyed by allowing women full membership, the hearing examiner's order does not require the Jaycees to abandon its purpose of providing leadership training, self improvement, and community involvement to young men.

There is no reason to believe that opportunities for young men would be restricted or that male members would not be able to take full advantage of activities and programs offered by the Jaycees if women become full members. *Cf. Lucido v. Cravath, Swaine, & Moore*, 425 F.Supp. 123, 129 (S.D.N.Y. 1977) (Application of Title VII to law firm's partnership promotion practices held not to interfere with First Amendment rights.).

The Jaycees argues that Minnesota and its Supreme Court are in conflict with the holding of the Eighth Circuit Court of Appeals in *Junior Chamber of Commerce of Kansas City v. Missouri Chamber of Commerce*, 508 F.2d 1031 (8th Cir. 1975). That case is not controlling here, however. It held that the Jaycees' receipt of government funds did not convert its private action into state action, thereby triggering the due process guarantees of the Fifth Amendment. *Id.* at 1033-1034. The doctrine of state action is not at issue here. The Minnesota court found that because of its special characteristics the Jaycees is a public accommodation within the meaning of the Minnesota civil rights statute. The absence of state action does not preclude an entity's being a public accommodation. There is no doubt that an organization may be regulated by government even if it receives no governmental funding, and such an organization can also be a public accommodation for constitutional purposes if it offers services and facilities to the public. *See e.g., Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964).

The Jaycees also argues that the hearing examiner's cease and desist order prohibiting revocation of the charter of any local or state organization which extends equal membership privileges to women erodes its right to freedom

of association because it requires it to continue to offer services in Minnesota despite what it perceives to be an adverse legal climate. This argument misconstrues the nature of the hearing examiner's order. The purpose of the order was to require the Jaycees to do business in Minnesota in compliance with Minnesota law, if at all. It was obviously not the intent of the hearing examiner to require the Jaycees to continue to sell memberships in Minnesota in perpetuity, but instead to keep it from retaliating against local chapters which choose to obey Minnesota's proscription against sex discrimination in public accommodations.

2. *Vagueness and Overbreadth*

The Jaycees contends that Minn. Stat. §§ 363.03(3) and 363.01(18) as construed by the Minnesota Supreme Court are unconstitutionally vague and overbroad.

An enactment is void for vagueness if its prohibitions are not clearly defined, or if it does not give a person of ordinary intelligence reason to know what is prohibited. *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972). The exact application of this due process principle may vary depending on whether the enactment is criminal, penal regulation of business, of civil. *Compare Papchristou v. City of Jacksonville*, 405 U.S. 156, 162 (1972) *with United States v. National Dairy Products Corp.*, 372 U.S. 29, 32-33 (1963) *and Horn v. Burns and Roe*, 536 F.2d 251, 256 (8th Cir. 1976).

Even if the strict standard normally applied in criminal cases is used, the portions of the statute to which the Jaycees objects are not unconstitutionally vague. The term "place of public accommodation" when construed with normal aids to statutory construction can be understood by those of common understanding to apply to the Jaycees. *See generally Rose*

v. Locke, 423 U.S. 48, 50 (1975). Both the Minnesota Legislature and the Minnesota Supreme Court have noted that the provisions of the Minnesota Human Rights Act are to be construed liberally to effect its purposes. Minn. Stat. § 363.11; *State v. Bergeron*, 290 Minn. 351, 357, 187 N.W. 2d 680, 683-684 (1971). The findings of the Minnesota Supreme Court clearly illustrate the applicability of the statute to the Jaycees, based on facts concerning its recruitment policy and sales of memberships, all of which were well known to the Jaycees. *See United States Jaycees v. McClure*, 305 N.W.2d at 768-774.

The Jaycees attempt to attack the statute as applied for vagueness on the ground that other organizations will be unable to ascertain whether or not they fall within the definition of "place of public accommodation" must be rejected. The Jaycees has no standing to challenge the alleged vagueness of the statute on the basis of its hypothetical application to other groups. *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 58-59 (1976); *Parker v. Levy*, 417 U.S. 733, 756 (1973); L. Tribe, *American Constitutional Law*, at 720 (1976). Moreover, the Minnesota court in its lengthy discussion of the Jaycees and the statute made it amply clear that the statute only applies to a public business facility. A person of ordinary intelligence can understand what is prohibited by the statute as construed.

A statute which is sufficiently clear to survive an attack on the grounds of vagueness may still be invalid on the basis of overbreadth. The crucial question is whether the provision "sweeps within its prohibitions what may not be punished under the First and Fourteenth Amendments." *Grayned v. City of Rockford*, 408 U.S. at 115; *accord N.A.A.C.P. v. Button*, 371 U.S. 415 433 (1963). An over-

breadth challenge does not have the same standing requirement as vagueness; a litigant may raise overbreadth concerns on behalf of others not before the court on the grounds that the challenged statute may cause them "to refrain from constitutionally protected speech or expression." *Broadrick v. Oklahoma*, 413 U.S. 601, 612 (1973). However, overbreadth applies weakly, if at all, in the ordinary commercial context. *Ohralik v. Ohio State Bar Association*, 436 U.S. 447, 462 n.20 (1978); *Bates v. State Bar of Arizona*, 433 U.S. 350, 380 (1977). A limiting construction of a statute may narrow it so as to remove any threat to constitutionally protected activity. *Young v. American Mini Theatres, Inc.*, 427 U.S. at 60; *Broadrick v. Oklahoma*, 413 U.S. at 613.

The statutory provisions at issue are not overbroad, particularly in light of the limiting construction by the Minnesota Supreme Court under which the statute is only applicable to public business facilities which practice sex discrimination. The court explicitly noted that its decision would not affect private associations and memberships, including those which have more selective membership criteria than the Jaycees. *United States Jaycees v. McClure*, 305 N.W. 2d at 771.

The Jaycees argues at length that the Minnesota court's interpretation of the statute makes it applicable to a number of organizations including the Boy Scouts, the Kiwanis, the Sweet Adelines, and the like. There is insufficient evidence in the record pertaining to the activities of these groups to allow any determination whether the statute would apply to them and whether the groups engage in protected First Amendment activity. The record as to the Jaycees is, however, well developed. Speculation by the Jaycees as to the

future application of the statutes to other organizations does not provide a sufficient basis to undermine their constitutionality.

It is noteworthy that the Minnesota Human Rights Act was only applied against the Jaycees after complaints were brought by some of its own members in Minnesota who believed their rights were being violated by the Jaycees and sought the protection afforded by the statute.

The evidence supports the conclusion drawn by the Minnesota Supreme Court that the Jaycees is "engaged in the business of seeking to advance its members and to add to their ranks by assiduously selling memberships in this state" (305 N.W.2d at 774) on a non-selective basis.

In sum, Minnesota's interest in prohibiting public business facilities from sex discrimination outweighs any protected right of freedom of association the Jaycees may have, and the statute as construed is neither vague nor overbroad. This case must be decided on the basis of the specific statute before the court. Application of that statute against the Jaycees does not violate the Constitution. The statute is not unconstitutional, and judgment shall therefore be entered for defendants.

ORDER FOR JUDGMENT

Based upon the foregoing,

IT IS HEREBY ORDERED THAT:

1. Judgment herein be entered for defendants and against plaintiff.

2. The parties are to bear their own costs.

Dated: March 25, 1982.

DIANA E. MURPHY
U.S. District Judge

UNITED STATES DISTRICT COURT
Cal. 388

THE UNITED STATES JAYCEES,

Appellants,

vs.

MARILYN E. McCLURE, WARREN SPANNAUS, and GEORGE A. BECK,

Respondents.

Otis, J. Dissenting, Sheran, C.J., Peterson, J., Todd, J.

Endorsed

Filed May 8, 1981

John McCarthy, Clerk

Minnesota Supreme Court

SYLLABUS

Certified question from the United States District Court for the District of Minnesota: "Is the United States Jaycees 'a place of public accommodation' within the meaning of Minn. Stat. § 363.01, Subdivision 18?" Answer, affirmative.

Heard, considered, and decided by the court en banc.

OPINION

OTIS, Justice.

The United States District Court for the District of Minnesota has certified the following question to this court, in conformity with Minn. Stat. § 480.061(3) (1980): "Is the United States Jaycees 'a place of public accommodation' within the meaning of Minn. Stat. § 363.01 Subdivision 18?" We answer in the affirmative.

The case and question arise from a dispute between a national organization and two of its local affiliates. Their dispute concerns an admittedly unequal granting of the

privileges of membership. The national organization has settled on a policy that admits women to membership, but with the proviso that women shall not be accorded privileges that are full and equal to those accorded to men. The policy is effected by a distinction in the kinds of membership offered. Individual membership is offered to men, ages 18 to 35, in exchange for annual membership dues. Associate individual membership [hereafter "associate membership"] is offered to a business concern, association, group or individual not qualified by the by-laws to be an individual member. The annual dues charge is a few dollars less than the charge for an individual membership. Women, by definition, may be offered only associate membership.

The difference in the dues charged for those memberships is small; the difference in the privileges accorded is considerable. Associate members are not allowed to stand or be nominated for office; they are not allowed to vote in such elections, nor vote on any other matters of decision in the local, state, or national organizations; and, though women are allowed to participate in many of the programs of the organization and contribute their time and effort toward making those programs successful, women are not allowed to be the recipients of any of the numerous achievement awards given by the local, state and national organizations. The awards and the prestige are restricted to men. Men continue to receive awards even when, after age 35, they can only purchase the otherwise same associate membership as women.

This membership policy has not met with the approval of the organization's Minneapolis and St. Paul chapters. In 1974, the Minneapolis chapter began to allow women to purchase individual memberships, and accorded them privileges that were full and equal to those accorded to men. In 1975,

the St. Paul chapter made the same changes. The national organization, however, voted down an amendment to its by-laws that would have allowed individual memberships to be sold to women. The organization decided, instead, to set up a "pilot membership program". Local chapters in five states could let women purchase individual memberships. Only three of the affiliated state organizations voted to let their local chapters try the pilot program. The affiliated state organization in Minnesota voted not to try it. In June 1978, the president of the national organization ordered the pilot programs terminated. The national organization repeated its rejection of the proposed change in its policy of letting women purchase only an associate membership, costing a few dollars less but worth much less than the individual memberships that men could buy.

By letter, the national organization advised the Minneapolis and St. Paul chapters of its imminent plans to vote on whether to revoke their respective charters because those Minnesota chapters had violated the organization's by-laws by continuing to let women purchase individual memberships. On the previous day, December 14, 1978, the Minneapolis and St. Paul chapters brought before the Minnesota Department of Human Rights a charge of sexual discrimination against the national organization. They alleged violations of Minn. Stat. § 363.03(3), (6) (1980). The commissioner of the department investigated and found probable cause that there was a violation. The department attempted without success to conciliate the matter.

On October 9, 1979, a State Hearing Examiner found the national organization in violation of Minn. Stat. § 363.03(3) (1980), the pertinent part of which reads:

> It is an unfair discriminatory practice:
>
> To deny any person the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of a place of public accommodation because of race, color, creed, religion, disability, national origin or sex.

The Examiner held that the national organization discriminated unfairly on the basis of sex by refusing to let women purchase individual memberships. He enjoined the national organization from such discrimination in any of its chapter affiliates within Minnesota, and from taking sanctions against any of them for selling individual memberships to women.

The national organization responded with a petition for review of the Examiner's order to the Ramsey County District Court, and commenced an action, in the United States District Court for the State of Minnesota, for the purpose of reserving determination of federal constitutional claims arising from the application of Minn. Stat. § 363.03(3) (1980). The federal district court, in an attempt to expedite a decision of the pivotal issue, certified to this court the question of whether this national organization is a " 'place of public accommodation' within the meaning of Minn. Stat. § 363.01, Subdivision 18?"

Legislative guidance

In Minn. Stat. § 363.01(18) (1980) the legislature expressed its own special and unusually broad definition of the term "place of public accommodation": "a business, accommodation, refreshment, entertainment, recreation, or transportation facility of any kind, whether licensed or not, whose goods, services, facilities, privileges, advantages, or accommodations are extended, offered, sold, or otherwise

made available to the public." The legislature defines a term only because it intends in some measure to depart from the ordinary sense of that term. Thus, there is a presumption that we are not to substitute the literal, ordinary meaning of "place of public accommodation" for the definition the legislature has provided.

The legislature has, moreover, cautioned us against narrowly construing any of the provisions of Minn. Stat. § 363.03 (1980). It has broadened the term "place of public accommodation" to mean "a business * * * facility of any kind * * * whose goods * * * [and] privileges * * * are sold, or otherwise made available to the public". Minn. Stat. § 363.01(18) (1980). It has also expressly required a broad construction of all provisions of the statute by order of Minn. Stat. § 363.11 (1980) which reads, in pertinent part: "The provisions of this chapter shall be construed liberally for the accomplishment of the purposes thereof." Minn. Stat. § 363.12 (1980) states those purposes to be "to secure for persons in this state, freedom from discrimination * * *." To understand accurately what those purposes here require in a construction of Minn. Stat. § 363.01(18) (1980), we must review the history of that provision and of Minn. Stat. § 363.03(3) (1980) whose key term it defines.

Legislative history

In 1885, ten years before the United States Supreme Court put its imprimatur on the "separate but equal" fiction justifying the Jim Crow laws, the legislature of the State of Minnesota chose a different course, that of "full and equal" privileges, as it enacted this statute:

> That all persons within the jurisdiction of the state of Minnesota shall be entitled to the full and equal enjoyment of the accommodations, advantages, facilities and

> privileges of inns, public conveyances on land or water, theatres and places of public amusements, restaurants and barber shops, subject only to the conditions and limitations established by law and applicable alike to all citizens of every race and color, regardless of any previous condition of servitude.[1]

In 1897, the legislature broadened the scope of the statute by increasing the number and kind of enumerated sites on which a person would be held to have violated the statute if that person excluded

> any other person within the jurisdiction of the state of Minnesota, on account of race, color or previous condition of servitude, from the full and equal enjoyment of any accommodation, advantage, facility or privilege, furnished by innkeepers, hotel keepers, managers or lessees, common carriers or by owners, managers or lessees of theaters or other places of amusement, or public conveyance on land or water, restaurants, barbershops, eating houses, *or other places of public resort, refreshments,* accommodation or entertainment, or
>
> Denies, or aids or incites another to deny any other person because of race, creed or color, or previous condition of servitude, the full and equal enjoyment of any of the accommodations, advantages, facilities and privileges of any hotel, inn, tavern, restaurant, eating house, soda water fountain, ice cream parlor, public conveyance on land or water, theater, barbershop *or other place of public refreshment,* amusement, instruction, accommodation or entertainment, * * *.[2]

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[1] Act of March 7, 1885, ch. 224, § 1, 1885 Minn. Laws 295, 296.

[2] Act of April 23, 1897, ch. 349, §§ 2-3, 1897 Minn. Laws 616 (emphasis added).

We note that the legislature intended the statute to be applied to both fixed sites (e.g., hotels and restaurants) and mobile sites (e.g., public conveyances). Such sites were not to be limited to those enumerated, but were to include "other places of public * * * refreshment * * *."

This court held, in 1898, that the anti-discrimination statute had not been violated when a saloon keeper refused to sell a glass of beer to a former slave, solely because of that customer's race and color. *Rhone v. Loomis*, 74 Minn. 200, 77 N.W. 31 (1898). Within a year the legislature overruled that narrow construction with an amendment that added "saloons" to the enumerated list of fixed and mobile sites.[3]

In 1905, the legislature simplified the statute, deleting enumerated kinds of managers (e.g., hotel keepers), retaining most of the enumerated kinds of fixed and mobile sites and the broadly inclusive provision as to "other places of refreshment, entertainment, or accommodation." Minn. Rev. Laws (1905) ch. 55, § 2812.[4] In 1943 the legislature again extended the scope of the statute, amending it to prohibit discrimination based on "national origin or religion."[5]

In 1965, the legislature split the anti-discrimination in public accommodations statute, leaving in one statute the description of what constituted prohibited discrimination, Minn. Stat. § 327.09, subd. 1 (1965), and shifting the actual

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[3] Act of March 6, 1899, ch. 41, § 1, 1899 Minn. Laws 38, 38-39.

[4] Minn. Rev. Laws ch. 55 (1905) provided in pertinent part that: "No person shall be excluded, on account of race or color, from full and equal enjoyment of any accommodation, advantage, or privilege furnished by public conveyances, theaters, or other public places of amusement, or by hotels, barber shops, saloons, restaurants, or other places of refreshment, entertainment, or accommodation."

[5] Act of April 23, 1943, ch. 579, § 7321, 1943 Minn. Laws 831, 832.

prohibition to subdivision 3 of a new, unfair discriminatory practices statute, Minn. Stat. § 363.03 (1965).[6] Thus, Minn. Stat. § 363.03(3) (1965) read: *"Public accommodation:* (1) It is unfair discriminatory practice for any person to engage in an act forbidden by Minnesota Statutes 1961, Section 327.09." In 1967, the legislature revised subdivision 3; instead of prohibiting acts forbidden by Minn. Stat. § 327.09 (1967), it now had its own description of unfair discrimination that it prohibited within a scope far broader than that of the other statute, still in force, to which it had originally been attached and to which it had subsequently referred.[7] The broadening of that scope is best seen by a comparison of the two statutes. The older retained statute, Minn. Stat. § 327.09 (1967) reads:

> No person shall be excluded, on account of race, color, national origin, or religion from full and equal enjoyment of any accommodation, advantage, or privilege furnished by public conveyances, theaters, or other public places of amusement, or by hotels, barber shops, saloons, restaurants, or other places of refreshments, entertainment, or accommodations.

The newer statute, Minn. Stat. § 363.03(3) (1967), reads:

> Public accommodations. It is an unfair discriminatory practice:
>
> To deny an individual or group of individuals the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of a place of public accommodation because of race, color, creed, religion, or national origin.

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[6] Act of May 21, 1965, ch. 585, 1965 Minn. Laws 854; Act of May 21, 1965, ch. 586, 1965 Minn. Laws 854.

[7] Act of May 25, 1967, ch. 897, § 14, 1967 Minn. Laws 1932, 1938.

Both statutes prohibit the discriminatory denial of the full and equal enjoyment of advantages and privileges of certain kinds of sites. The older statute enumerated some of those kinds of sites, fixed and mobile. The new statute expanded that scope; it added to the prohibitions the discriminatory denial of the full and equal enjoyment of goods, services, and facilities; it encompassed more than the previous kinds of sites, for the legislature used not an enumerated list, but one broadly inclusive term—"place of public accommodation"—and the legislature defined that term to mean: "a business * * * facility of any kind * * * whose goods * * * [and] privileges * * * are extended, offered, sold, or otherwise made available to the public." Minn. Stat. § 363.01(18) (1967).

Thus, while the older statute contemplated only certain fixed and mobile sites, the new statute encompasses a "business facility of any kind," whether fixed or mobile. While the older statute concentrated on the kinds of sites where discrimination would be prohibited, the new statute focuses on *conduct* in which discrimination would be prohibited and thus speaks not of a business facility *where* goods and privileges are offered, but rather, of "a business * * * facility of any kind * * * *whose* goods * * * [and] privileges are * * * offered, sold, or otherwise made available to the public." Minn. Stat. § 363.01(18) (1967) (emphasis added). The question for decision is whether that statutory definition encompasses the national organization now before this court. We turn to examine that organization.

Characteristics and practices of the national organization

Our examination of the national organization (and its local affiliates) proceeds along three lines set out in Minn.

Stat. § 363.01(18) (1980): (1) is the national organization a *business* in that it sells goods and extends privileges in exchange for annual membership dues?; (2) is the national organization a *public* business in that it solicits and recruits dues paying members but is unselective in admitting them?; and (3) is the national organization a public business *facility* in that it continuously recruits and sells memberships at sites within the State of Minnesota? The record before us clearly reveals that the answers to those questions are affirmative.

We address first whether the national organization is a *business*. The national organization urges this court to draw a distinction between an organization's internal activities (e.g., membership dues) and its external activities (e.g., inviting the public to participate in the organization and the activities it conducts). With this distinction the national organization contends that membership in it is equivalent to ownership of the organization; it then concludes that ownership, or a share of ownership of an organization, is beyond the scope of Minn. Stat. § 363.01(18) (1980), for that subdivision concerns only the goods and privileges offered or sold to the public by a business, and does not concern its ownership.

To be substantiated, the analogy would have to be borne out, in the record, by the way the national organization regards its current and prospective members, i.e. as its present and potential owners, rather than as its customers. The record before us reveals a national organization that regards its members more as customers than as owners. The national organization's *Officers' & Directors' Guide 1978-79* refers to members as the officers' "customers." (Exhibit 6,

p. 27). The national organization's *Recruitment Manual* has this preface to its recommended sales approach to prospective members: "JAYCEES, THE PRODUCT you are selling, is outstanding from any angle. *Jaycees is the 'best value' you can get.*" (Exhibit 24, p. 5) (emphasis in original). The *Recruitment Manual* cautions that "[o]nce a young man becomes a member, the responsibility to deliver the goods you sold him begins." (Exhibit 24, p. 1). The national organization's *Regional Director's Handbook 1977-78* discusses "How to Sell Jaycees" and reminds the directors to "Know your product." (Exhibit 44, p. 21).

The product being sold is membership in an organization whose aim is the advancement of its members. Thus, the national organization's *Chapter President's Management Handbook 1977-78* reminds the presidents of their responsibility to ensure that those holding individual memberships "will indeed have a slight edge in life over the non-Jaycee * * *." (Exhibit 2, p. 36). This "edge" that members obtain takes several forms. The president of the national organization, in letters published in *Future* (the official publication of the organization), maintains that it is "the greatest young men's leadership-training organization * * *." *Future*, Jan.-Feb. 1979, at 4 (Exhibit 55); *Future*, March-April 1979, at 5 (Exhibit 54). The organization asks business firms to pay the dues of individual memberships for a number of their employees; the fact that firms often do so suggests that those employees are viewed by their firms as receiving an edge, and that may help them when they are considered for promotion. Those holding individual memberships and who become officers in the organization thereby receive enhanced leadership experience and enjoy the enhanced privileges and advantages of making contacts with

others, often business contacts. In this regard we note that the national organization has successfully sued under the trade-mark laws to have one of its disaffiliated chapters enjoined from infringing on its name and from engaging in unfair competition with the national organization, *United State Jaycees v. San Francisco Junior Chamber of Commerce*, 513 F.2d 1226 (9th Cir. 1975); the concurring opinion of Judge Ely observed that "it seems clear that the term 'Junior Chamber of Commerce' does refer to the specific source of a 'product' (the National/Jaycees) * * *." *Id.*

By virtue of its sale of individual memberships (with the accompanying goods and privileges) the national organization is a *business*.

Is the national organization a *public* business? The national organization contends that it is a private organization; its brief cites three decisions by Circuit Courts of Appeal and claims that these upheld the non-public character of the national organization. *See New York City Jaycees, Inc. v. United States Jaycees, Inc.*, 512 F.2d 856 (2d Cir. 1975); *Junior Chamber of Commerce v. Missouri State Junior Chamber of Commerce*, 508 F.2d 1031 (8th Cir. 1975); *Junior Chamber of Commerce of Rochester, Inc. v. United States Jaycees*, 495 F.2d 883 (10th Cir.) *cert. denied*, 419 U.S. 1026 (1974). Those decisions, however, are inapposite. In each of them the issue was whether the national organization's receipt of federal funds and its status as a tax exempt organization constituted state action sufficient to subject it to scrutiny under a federal constitutional standard. All three circuit courts answered that question in the negative. To hold, however, that by such activities the national organization is not an entity of state action is far from holding that it is a private organization, and, in fact,

gives no insight to the construction of the statute in controversy.

The national organization contends that the most relevant reported case is the Oregon Supreme Court's decision that Cub Scouts were not within the definition of a "place of public accommodation," and, therefore, could exclude girls from membership. *Schwenk v. Boy Scouts of America*, 275 Or. 327, 551 P.2d 465 (1976). Because of its reasoning, the decision is irrelevant to the present controversy. The Oregon Supreme Court conceded that the Boy Scouts of America may not be a "distinctly private" club so as to come within the Oregon statute's exemption of private clubs. 275 Or. at 335, 551 P.2d at 469.[8] The court relied almost entirely on the statute's legislative history that showed that there was some doubt as to whether the Y.M.C.A. and the Y.W.C.A. were "places of public accommodation." The court reasoned, then, that by analogy the Oregon Public Accommodation Act was not intended "to include the Boy Scouts of America, at least to the extent of requiring it to accept applications by girls for membership." 275 Or. at 336, 551 P.2d at 469. The statute in controversy here has quite different legislative history. Therefore, the Supreme Court of Oregon's

[8] The pertinent statute reads:

(1) A place of public accommodation, subject to the exclusion in subsection (2) of this section, means any place or service offering to the public accommodations, advantages, facilities, or privileges whether in the nature of goods, services, lodgings, amusements or otherwise.

(2) However, a place of public accommodation does not include any institution, bona fide club or place of accommodation which is in its nature distinctly private.

Or. Rev. Stat. § 30.675 (1979).

decision in *Schwenk* provides neither analogy for nor insight into the question before this court.[9]

There are, however, cases that provide criteria for deciding, in the context of a public accommodation statute, whether a group is private or public. *See Nesmith v. Young Men's Christian Association*, 397 F.2d 96 (4th Cir. 1968); *Cornelius v. Benevolent Protective Order of Elks*, 382 F. Supp. 1182 (D. Conn. 1974); *Wright v. Cork Club*, 315 F. Supp. 1143 (S.D. Tex. 1970). Two criteria tend to be used: (1) the selectiveness of the group in the admission of members, i.e., standards and a formal procedure by which membership is restricted; and (2) the existence of limits on the size of the membership. *See Nesmith*, 397 F.2d at 102; *Cornelius*, 382 F. Supp. at 1203; *Wright*, 315 F. Supp. at 1153.

The national organization would have us disregard these clear standards, or to observe, instead, that Minn. Stat. § 363.01(18) (1980) makes no mention of size as a criterion. Thus, it argues to apply such a test would leave officers of

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[9] *Cf. Graham v. Kold Kist Beverage Ice, Inc.*, 43 Or.App. 1037, 607 P.2d 759 (Or. 1979) (construing Or. Rev. Stat. § 30.675 (1979)), decided since *Schwenk*, and holding that "a corporation engaged in the wholesale business of selling commercial equipment at wholesale for use in retail stores * * *" is *not* engaged in the sale of goods "to the public" and is, therefore, not a "public accommodation." *Id.* at ——, 607 P.2d at 762. The wholesaler had agreed to sell its ice machines to plaintiff Graham and then refused when it discovered that he was black. The decision relies on *Schwenk*. If *Graham* is not reversed by the Oregon Supreme Court, then there is yet another reason for this court to find *Schwenk* an inapposite analogy; under Minn. Stat. § 363.01(18) (1980) one could not argue that a wholesaler was not a "public accommodation," for it undoubtedly would be a "business"—and would be guilty of violating the statute if it so engaged in racial discrimination. *Schwenk* is, therefore, of dubious value in deciding the present case.

small organizations wondering whether their group has become too big to avoid the criminal penalties of the statute.

The national organization's contention lacks merit. A public organization can avoid criminal penalties by simply not engaging in prohibited, unfair discrimination. Private associations and organizations—those, for example, that are selective in membership—are unaffected by Minn. Stat. § 363.01 (18) (1980). Any suggestion that our decision today will affect such groups is unfounded.

We, therefore, reject the national organization's suggestion that it be viewed analogously to private organizations such as the Kiwanis International Organization. Instead, we look at what this national organization is by itself. The record before us reveals a national organization that strives for growth, especially in "individual memberships"; it is unselective in those to whom it sells its memberships; selectiveness occurs only in the privileges and benefits it accords to those holding one kind of membership rather than another.

Counsel for the national organization contended, in oral argument, that a process of "natural selection" operates to make its membership selective. We find that process unexplained, unsupported, and unpersuasive. We find, in fact, that the national organization encourages continuous recruitment and discourages the use of any selection criteria. More than 80% of the national officers' time is devoted to spurring on the sale of memberships. The *Regional Director's Handbook 1977-78* advises: "Don't set membership goals for chapters. Let them set their own (as long as they plan an *increase* in membership)." (Exhibit 44, p. 14) (emphasis in original). The national organization's *Committee Chairman's Workbook*, in its instructions on how a chairman should present a project for his board's approval, proclaims

that "Jaycees are in the *People* business—not the project business" (Exhibit 43, p. 2) (emphasis in original) and advises the chairman to emphasize and link "Publicity Value and Recruitment Value. If your project will get the chapter's name in the paper and will possibly result in a few new members for the chapter, be sure that these facts 'headline' your presentation. It's sure to 'perk up their interest' in your project." (Exhibit 43, p. 5). More than half of the organization's individual and group achievement awards are conditioned, in part, upon recruitment achievement. (Exhibit 76). The organization encourages record breaking performance in selling memberships, e.g., most in a year by one person (348), most in a month (134), most in a lifetime (1,586). (Exhibit 70, p. 20). This continuous concern for growth undercuts the national organization's claim to be a private organization.

Most important, though, is the absence of selection criteria. This is evinced by the national organization's *Officer & Directors' Guide 1977-78* which advises that the emphasis in recruitment be on quantity rather than quality: "What is your obligation as Jaycees? Is it to only recruit a chosen few who * * * are deemed to be quality members? * * * How you sign up a member is not nearly as important as what you do with that member once he has been inducted." (Exhibit 52, p. 21). According to Lowell Larson, the Executive Director for the affiliated organization of Minnesota, the national organization does not publish anything with respect to criteria that local chapters should use to select their members; there is, instead, an emphasis on soliciting memberships from "as many people and as diverse as possible." (Hearing Transcript, p. 112). Mr. Larson further testified that, to his knowledge, there has never been a rejec-

tion of any application for membership. (Hearing Transcript, p. 135). By virtue of its unselective, vigorous sale of memberships, the national organization is a *public* business.

We pass to the last and seemingly most difficult question: Is this national organization a public business *facility*? The national organization contends that only if it were to "establish a business at a physical location within the State of Minnesota, and invite the patronage of the general public * * *" would that "place" or "facility" constitute a place of public accommodation under Minn. Stat. § 363.01(18) (1980). Brief for Appellant at 17. That argument substitutes a literal, ordinary definition of "place of public accommodation" for the one enacted by the legislature. The history of the anti-discrimination statutes shows that the scope of the older statute, still in force, Minn. Stat. § 327.09 (1980), concentrated on locations and encompassed both fixed and mobile sites. The newer statute, in controversy here, Minn. Stat. § 363.01(18) (1980), focuses on the *conduct* of a "business facility of any kind." We are not persuaded by analogies to hotels, restaurants, and "hot tamale stand[s]". Brief for Appellant at 17.

Food and lodging do not exhaust the category of a "business * * * facility of any kind * * * *whose* goods, * * * *privileges*, [and] *advantages* are * * * sold or otherwise made available to the public." Minn. Stat. § 363.01(18) (1980) (emphases added). Leadership skills are "goods," business contacts and employment promotions are "privileges" and "advantages," and each site in the State of Minnesota where the sale of those "goods" is solicited, promoted, and consummated is unquestionably a "business facility."

If we were to look for a fixed site of the national organization's "business facility" we would find it in the affiliated state organization's headquaters in Chaska, Minnesota, where the state organization's officers devote much of their time to promoting the solicitation and sale of memberships by the local chapters.

If we were to look for mobile sites of the national organization's "business facilities" we would find them in the sometimes door-to-door, company-to-company solicitation of members for the organization, and we would find them in the oft-shifted sites at which the affiliated local chapters hold meetings during part of which a sales approach is usually made to prospective members invited to the meeting for that purpose. *See Future*, March-April 1979, at 24 ("Many chapters use refreshments as a means to get [membership] prospects to the meeting, * * * if that is the only way—use it." quoting *New Recruitment Manual* (Exhibit 54)). A variety of enterprises that serve the public do not extend their goods and privileges from the same physical location (e.g. electricians, locksmiths, learning-at-home courses), and often they do not own or lease the sites at which they offer their goods and privileges. *Cf. First National Bank v. Dickinson*, 396 U.S. 122, 137 (1969), (holding that an armoured car picking up merchants' cash boxes and checks is a *branch bank, a place of business*, under § 7 of the McFadden Act.)

An instructive analogy can be found in a decision by the New Jersey Appellate Division that held Little League to be a "place of public accommodation." *National Organization for Women v. Little League Baseball, Inc.*, 127 N.J. Super. 522, 318 A.2d 33, *aff'd mem.*, 67 N.J. 320, 338 A.2d 198 (1974). Unlike the new statute in the instant case, the New

Jersey statute does not provide a brief definition of "place of public accommodation"; instead, it enumerates 65 varieties of such places.[10] Little League was not one of the enu-

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[10] The pertinent statute reads:

> 'A place of public accommodation' shall include, but not be limited to: any tavern, roadhouse, hotel, motel, trailer camp, summer camp, day camp, or resort camp, whether for entertainment of transient guests or accommodations of those seeking health, recreation or rest; any producer, manufacturer, wholesaler, distributor, retail shop, store, establishment, or concession dealing with goods or services of any kind; any restaurant, eating house, or place where food is sold for consumption on the premises; any place maintained for the sale of ice cream, ice and fruit preparations or their derivatives, soda water or confections, or where any beverages of any kind are retailed for consumption on the premises; any garage, any public conveyance operated on land or water, or in the air, any stations and terminals thereof, any bathhouse, boardwalk, or seashore accommodation; any auditorium, meeting place, or hall; any theatre, motion-picture house, music hall, roof garden, skating rink, swimming pool, amusement and recreation park, fair, bowling alley, gymnasium, shooting gallery, billiard and pool parlor, or other place of amusement; any comfort station; any dispensary, clinic or hospital; any public library; any kindergarten, primary and secondary school, trade or business school, high school, academy, college and university, or any educational institution under the supervision of the State Board of Education, or the Commissioner of Education of the State of New Jersey. Nothing herein contained shall be construed to include or to apply to any institution, bona fide club, or place of accommodation, which is in its nature distinctly private; nor shall anything herein contained apply to any educational facility operated or maintained by a bona fide religious or sectarian institution, and the right of a natural parent or one in loco parentis to direct the education and upbringing of a child under his control is hereby affirmed; nor shall anything herein contained be construed to bar any private secondary or post-secondary school from using in good faith criteria other than race, creed, color, national origin or ancestry, in the admission of students.

N.J. Stat. Ann. § 10:5-5(1) West Sup. 1980).

merated varieties. The New Jersey court considered a broad construction of "place" to be appropriate because "the statutory noun 'place' (of public accommodation) is a term of convenience, not of limitation." 127 N.J. Super. at 531, 318 A.2d at 37. The court then observed that the "place," in the case of Little League, is the ball field. Presumably the court was not unaware of the fact that Little League often does not own the real estate on which its ball fields are located, for as the court noted:

> [W]e discern nothing in the statute or its underlying purposes to persuade us that what would otherwise be a place of public accommodation is any less so because its management and sponsorship is by a nonprofit or membership organization rather than a commercial enterprise, or because it does not have exclusive use of possession of the site of its operations.

Id. at 531-32, 318 A.2d at 38.

The national organization before this court attempts to distinguish the *Little League* case on two grounds. First, it argues that Little League dominates organized baseball for children, whereas this national organization does not dominate the field of organized community services. That distinction is irrelevant to the question of what constitutes a "place of public accommodation," because no insight into that question can be drawn from the concept of such domination.

The national organization's second basis for distinguishing *Little League* is that Little League, by making extensive use of local community owned facilities, thereby engaged in discrimination on public property and thus involved a unit of government. The New Jersey court did not decide the case on, or even mention that as a basis for its decision.

Again, the distinction does not detract from the significant fact that the New Jersey Supreme Court held that a "place of public accommodation" or a "facility" is less a matter of whether the organization operates on a permanent site, and more a matter of whether the organization engages in activities in places to which an unselected public is given an open invitation.

The question, therefore, of what constitutes a "facility," or more precisely, a "public business facility" turns ultimately on whether the organization invites only a screened and selected portion of the public, or whether, instead, it has a standing, open invitation to an unscreened, unselected, and unlimited number of persons from the general public. Little League did little screening except to age and sex, and the New Jersey Supreme Court affirmed a decision that Little League constituted a "place of public accommodation." By contrast, the national organization before this court does even less screening because it admits women to associate membership, and therefore, it has given an open invitation to virtually anyone to become a dues paying individual or associate member.

The meeting place to which that unscreened, unselected, and unlimited number of persons is invited, constitutes as we see it a public business *facility*.

We have discussed the term "facility" with regards to sites, both fixed and mobile. We acknowledge, however, that courts in other jurisdictions have construed the term more liberally, and have done so since the late Nineteenth Century—a time when this state's anti-discrimination statute was new and included mention of "facilities." Thus, in 1898, the Supreme Court of Montana had to decide whether money raised by a tax levied, under a statute, for the pur-

pose of furnishing "additional school facilities" could be used to pay salaries of teachers; the question depended upon the scope of the expression "additional school facilities" as employed in the statute. The court rejected a narrow interpretation that would have limited such "facilities" to inanimate objects. *State ex rel. Knight v. Cave*, 20 Mont. 468, 52 P. 200 (1898). As the court observed,

> [t]hat which aids, assists, or makes more easy the acquisition of knowledge is a convenience and an advantage, and is clearly a "facility." Books, maps, globes, and charts are facilities to the imparting of knowledge. * * * But the meaning of the word is not limited to inanimate bodies or things. *Men are often facilities.* Without a crew to man his vessel, the master of a ship would not have the necessary facilities. A school with a complement of pupils in every room, but lacking teachers, would certainly not have facilities to carry on educational work. * * * Parents often remove their families to a place with good school or educational facilities, the chief reason actuating them being the quality of teachers, and not the mere inanimate advantages. * * * Teachers are the means of imparting knowledge to pupils, and are therefore educational facilities.

20 Mont. at 475-76, 52 P. at 203 (emphasis added). *Accord, Nekoosa-Edwards Paper Co. v. Railroad Commission of Wisconsin*, 193 Wis. 538, 547, 213 N.W. 633, 636 (1927) ("Facilities" includes human agencies) ("We see no difficulty in holding that the switch engine with its crew * * * constitutes a facility * * *."); *see Cheney v. Tolliver*, 234 Ark. 973, 977, 356 S.W. 2d 636, 634 (1962).

We need not decide whether "facilities" should be construed to include persons. What we decide here is that an organization engaged in the business of seeking to advance its members and to add to their ranks by assiduously selling memberships in this state is a "public business facility." In more familiar terms, such an organization has more than the "minimum contacts" to qualify as doing business in this state, and its facilities are anywhere it promotes, solicits, and engages in the sale of memberships on an unselective basis. We have discussed this question, for the most part, without reference to the prohibited kind of discrimination involved in this case. The certified question does not ask us to weigh the merits of this organization's business policies. If the national organization now before this court were conducting its business by discriminating on the basis of race, prohibited in Minnesota since 1885, we would have no difficulty holding that its activity was prohibited; the fact that the discrimination in this case is based on sex, prohibited in Minnesota since 1972,[11] in no way alters our decision and its grounds. The answer to the certified question is affirmative.

SHERAN, Chief Justice (dissenting).

Although the result reached in the majority opinion is felicitous, I cannot believe that the members of the Minnesota legislature who voted for the law we have been called upon to construe thought the Junior Chamber of Commerce, a service organization, to be "a place of public accommodation." The obligation of the judiciary is to give that meaning to words accorded by common experience and understanding. To go beyond this is to intrude upon the

[11] Act of May 24, 1973, ch. 729, § 3, 1973 Minn. Laws 2158, 2164.

policy-making function of the legislature. The majority opinion does that in this case to a degree which compels this expression of dissent.

PETERSON, Justice.

I join in the dissent of Chief Justice Sheran.

TODD, Justice.

I join in the dissent of Chief Justice Sheran.

STATE OF MINNESOTA
OFFICE OF HEARING EXAMINERS
FOR THE DEPARTMENT OF HUMAN RIGHTS

STATE OF MINNESOTA, BY WILLIAM L. WILSON, AND HIS SUCCESSOR, MARILYN E. McCLURE, COMMISSIONER, DEPARTMENT OF HUMAN RIGHTS,

Complainant,

vs.

THE UNITED STATES JAYCEES,

Respondent.

FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER

The above-entitled matter came on for hearing on April 23, 1979, before State Hearing Examiner George A. Beck in the Hearing Room of the Minnesota Department of Commerce on the Fifth Floor of the Metro Square Building located in Saint Paul, Minnesota. The hearing continued to the following day. The final written brief in this matter was filed on September 11, 1979, and the record closed on that date.

Richard L. Varco, Jr., Special Assistant Attorney General, 240 Bremer Building, Saint Paul, Minnesota 55101, appeared on behalf of the Complainant. Clay R. Moore, Esq. of the firm of Mackall, Crounse and Moore, 1100 First National Bank Building, Minneapolis, Minnesota 55402, and Carl D. Hall, Jr., Esq. of the firm of Hall, Sublett, McCormick and Andrew, 1776 Williams Center, Tulsa, Oklahoma 74172, appeared on behalf of the Respondent.

The following witnesses testified at the hearing: Lowell Larson, Valdis Vavere, Daniel Aberg, Kathryn Ebert, Kathleen Hawn, Sally Pedersen, Donald G. Varnadore and Gary W. Flakne.

Ninety written exhibits were offered and received on behalf of the Complainant and ten written exhibits were offered and received on behalf of the Respondent. A list of exhibits is attached to this Report.

Based upon the testimony, exhibits and briefs filed herein, the Hearing Examiner makes the following:

FINDINGS OF FACT

Procedural Matters

1. That on December 14, 1978, a charge of discrimination was filed with the Department of Human Rights by four members of the St. Paul Chapter of the United States Jaycees, including its president, alleging a violation of Minn. Stat. Sec. 363.03 by the respondent. (Ex. 89) A copy of the charge was served upon the respondent by certified mail on December 15, 1978. (Exs. 90A, 90B, 91, 92)

2. On December 19, 1978, a charge of discrimination was filed with the Department of Human Rights by four members of the Minneapolis Chapter of the United States Jaycees, including its president, alleging a violation of Minn. Stat. Sec. 363.03. (Exs. 81, 82, 83, 84) A copy of the charges was served upon the respondent by certified mail on December 20, 1978. (Exs. 85, 86, 87, 88A, 88B)

3. Subsequent to the filing of these charges, the Department conducted an investigation of the allegations contained in the charges, and on January 25, 1979, the Commissioner of the Department of Human Rights found probable cause to believe that the respondent had committed a violation of Minn. Stat. Sec. 363.03, subds. 3, 6 and 7 (1978). This find-

ing of probable cause was served upon the respondent, together with a notice of and order for hearing in this matter, by certified mail on January 25, 1979. (Exs. 93, 94, 95)

4. The Department of Human Rights has attempted to conciliate this matter without success.

5. On February 27, 1979, the respondent filed an action in the United States District Court for the District of Minnesota entitled, *The United States Jaycees v. William L. Wilson, Commissioner, Minnesota Department of Human Rights, and Warren Spannaus, Attorney General of the State of Minnesota.* In that action, the U.S. Jaycees asked that the Court declare Minn. Stat. Sec. 363.01, subd. 18 and Minn. Stat. Sec. 363.03, subd. 3, 6, and 7, unconstitutional facially and as applied to the respondents in this administrative proceeding. The U.S. Jaycees asked the Court to abstain from a determination of the merits of the constitutional claims until the conclusion of this administrative proceeding.

6. In this administrative proceeding, the respondent has stated its intention to reserve for determination by the United States District Court all federal constitutional claims challenging the validity and application of the afore-cited statutes. This reservation is asserted under the authority of *England v. Louisiana State Board of Medical Examiners*, 375 U.S. 411, 11 L.Ed.2d 440, 84 S. Ct. 461 (1964). The *England* case generally holds that a federal court litigant who is remitted to state court under the doctrine of abstention may preserve his right to return to federal court for the disposition of his federal constitutional claims where he refuses to litigate his federal constitutional claims in state court. The complainant has consented to this procedure.

7. By Order dated June 11, 1979, U.S. District Judge Miles Lord dismissed the U.S. Jaycees action without preju-

dice. In its Order, which was based upon a stipulation by the parties, the Court stated that the U.S. Jaycees could, pursuant to *England, supra*, refrain from litigating any constitutional claims in this state administrative proceeding and subsequently recommence the federal action to assert said federal constitutional claims in the event that the state proceedings were determined adversely to the U.S. Jaycees.

The U.S. Jaycees

8. The United States Jaycees is a non-profit corporation organized under the laws of the state of Missouri (T. B6, Ex. J) with its headquarters located in Tulsa, Oklahoma. (T. B7) The organization is exempt from federal income taxes. (Ex. H, Ex. I; T. B36) There are approximately 8,800 local Jaycee chapters and 51 state organizations affiliated with the U.S. Jaycees. (T. B9) Nationwide, there are approximately 386,000 individual members. (T. B21) The respondent maintains a regional office at Chaska, Minnesota. (Ex. 80, p. 7) The ultimate policymaking body of the U.S. Jaycees is an annual national convention consisting of delegates from each local chapter. (T. B16) The convention elects a national President, who, together with a Board of Directors and an Executive Committee, governs the organization. The State Presidents constitute a majority of the national Board of Directors. (T. B14-16; Ex. 1, pp. 9-11)

9. The By-laws of the U.S. Jaycees define an individual member (or "regular member"; T. A71) as follows:

> BY-LAW 4-2.
>
> INDIVIDUAL MEMBERS
>
> Young men between the ages of eighteen (18) and thirty-five (35), inclusive, of Local Organization Members in good standing in this Corporation shall be considered Individual Members of this Corporation (un-

less the ages for membership shall have been changed by the State Organization Member as hereinabove permitted by By-Law 4-4.A.). Such Individual Members shall be qualified by, and represented through, the Local Organization Member so long as he shall pay the dues to the Local Organization specified in its by-laws, constitution or articles of incorporation (which shall include a subscription to FUTURE Magazine). If any Individual Member shall arrive at the age of thirty-six (36) after the beginning of his Individual Membership Anniversary Date, such member shall be deemed an Individual Member until his next Anniversary Date, or in the case of any Individual Member holding office in the Corporation, a State Organization Member, or a Local Organization Member, until completion of such term of office; provided that no Individual Member shall be permitted to hold any such office if he has reached age thirty-six (36) prior to the commencement of the term of such office, except as otherwise provided herein.

(Ex. 1, pp. 3-4; T. B12)

10. An associate individual member is defined in the by-laws in the following language:

BY-LAW 4-3.

ASSOCIATE INDIVIDUAL MEMBERS

An Associate Individual Member is a business concern, association, group or individual not qualified by these By-Laws and Policy to be an Individual Member of a Local Organization Member. An Associate Individual Member is not an Individual Member of The United States Jaycees and shall not have the right to vote or the right to be an officer or director in The United

States Jaycees, a State Organization Member or a Local Organization Member.

(Ex. 1, p. 4; T. A159; T. B12) An associate member may participate in Jaycee programs, but cannot receive awards. (T. A49, A156, A161)

11. By-laws describe a local organization member (or "local chapter") as follows:

BY-LAW 4-4.

LOCAL ORGANIZATION MEMBERS

A. Any young men's organization of good repute existing in any community within the United States, organized for purposes similar to and consistent with those of this Corporation, and whose officers and Individual Members are young men between the ages of eighteen (18) and thirty-five (35) years of age, inclusive, shall be eligible for affiliation as a Local Organization Member; provided, however, that any State Organization Member, at its option, may restrict the minimum age of members for Individual Members of such State Organization Member to an age more than eighteen (18) but not more than twenty-one (21) years of age.

(Ex. 1, p. 4; T. B10)

12. These by-laws allow women to be associate members, but not regular members and therefore prohibit women from voting or serving as a local chapter president, vice president or director, or as a state organization officer or regional or district director, or as a national officer or director. (T. A28, A107) Both the Minneapolis and St. Paul Chapters, which are local organization members, are currently in violation of By-law 4-4, (T. B11) and have adopted local By-laws which permit women to be individual members and, therefore, conflict with the respondent's by-laws (Ex. 16, 17)

13. In 1975 the national Jaycee convention voted by a margin of approximately 90% to 10% against changing a by-law to allow local chapters to admit women as regular members. (T. B22; Ex. 26, p. 20) That year, however, the national leadership set up a "pilot membership program" to allow local chapters in up to five states to accept women as regular local and state members. Three states, Alaska, Massachusetts, and the District of Columbia, voted to participate. (T. B23) The Minnesota State Convention voted in late 1975 or early 1976 not to participate in the "pilot program". (T. A121, B24) The "pilot program" was terminated by the National President in June of 1978. (T. B24) The 1978 national convention defeated, by a margin of approximately 78% to 22%, another motion to give local chapters the option to admit women as regular members. (T. B25; Ex. 26, p. 20)

The Local Chapters and Women Members

14. The Minneapolis Chapter of the U.S. Jaycees has admitted women as regular members since 1974, and has been in violation of By-law 4-4 since that time. (T. A120, A157) The chapter currently has approximately 150 to 180 women members of a total of 430. (T. A123; Ex. 57-60) Eight women now serve on the 26-person Board of Directors and women serve in the capacity of vice president and state delegate. (T. A124) Serving as an officer or director provides substantially greater leadership training and responsibility than general membership or serving as the chair of a single committee. (T. A161, A177, A197) From 1975 to June of 1978, the chapter has been subjected to sanctions for violation of the respondent's by-laws, such as its members being ineligible for state or national office, its membership not being counted in computing votes at national

conventions, and ineligibility for hosting national events. (T. A122) A Minneapolis woman member nominated by the chapter for a national award was not considered. (T. A141) By letter dated December 15, 1978, the Minneapolis Chapter was advised by the respondent's President that a January 19, 1979 meeting of respondent's Executive Board of Directors in Tulsa would vote on a motion to revoke the charter of the chapter for violation of the by-laws which restrict individual membership to men. (Ex. 78; T. A123, B27; Ex. 26, p. 21)

15. The St. Paul Chapter of the U.S. Jaycees has admitted women as regular members since 1975. (T. A168) Currently, the chapter has 400 members of whom approximately 100 are women. Women also serve on the chapter's Board of Directors. (T. A169; Ex. 5, 79) Because of its admission of women as full members, the chapter has had sanctions imposed against it similar to those imposed against the Minneapolis Chapter. (T. A168) By letter dated December 15, 1978, the St. Paul chapter was also asvised by the National President that a January 19, 1979 meeting in Tulsa of the respondent's Executive Board of Directors would vote on a motion to revoke the chapter's charter for violation of the by-laws which restrict individual membership to men. (Ex. 77; T. A168, B27)

16. Kathryn Ebert has been a member of the Minneapolis Chapter of the Jaycees since February of 1975. She holds a B.A. degree from Northwestern University and is an interior architect employed by Dayton's Commercial Interiors. She is currently the project team leader for the interior design of the new Pillsbury Center in downtown Minneapolis. (T. A188-189) In 1976, Ebert became chairman of the chapter's training and development committee

and an ex officio member of the chapter's Board of Directors. Later in 1976, she became a member of the Board and headed the civic affairs committee. From 1976 to May of 1978, Ebert served as a Vice President of the Jaycee Foundation and as an executive committee member. As a Vice President, she supervised four committees and approximately 100 people. In April of 1977, Ebert was a candidate for President of the Minneapolis Chapter. (T. A190)

Ebert testified that her Jaycee participation allowed her to acquire speaking skills, leadership skills and organizational skills at a young age. She believes that this leadership development enabled her to gain a promotion by her employer to project team leader. (T. A191-192) She testified that being a Vice President was more valuable in terms of leadership development than being a committee chairman. (T. A197) She also commented that working with men in the Jaycees was beneficial since about 90% of her clients are men. (T. A195)

17. Kathleen Hawn has been a member of the St. Paul Chapter of the Jaycees since 1976. She is a graduate of Archbishop Murray High School in St. Paul and has been employed by Minnesota Mutual Life Insurance since July of 1977, where she is currently a methods analyst. (T. A198, A 202) While a Jaycee member, she has served as secretary and then director of the human natural resources committee, as a state delegate, and as a district director. She has chaired three major events for the St. Paul Jaycees and has received several awards including a gold key as an outstanding director. (T. A199)

Ms. Hawn testified that the Jaycees "Speak Up" program developed her speaking abilities and aided in her presenta-

tions at work. As a Jaycees director, she supervised others for the first time, learned how to plan and delegate, and gained self-confidence by working with management caliber people. (T. A204, A206) Ms. Hawn testified that taking one of her superiors to the Jaycees Bosses Night, at which she received an award, contributed to her later promotion to a job where she supervises three men and one women. (T. A201-203) Approximately 80% of the people she works with are men. (T. A205)

18. Sally Pedersen has been a Minneapolis Jaycee for two years and prior to that was a Jaycee in Rochester, New York for 3 1/2 years. (T. A207) She attended the University of Rochester and is currently employed as a customer support representative with Eastman Kodak Co. She began her career with Kodak as a lab technician and when she inquired about advancement, the personnel department suggested that she join the Jaycees. She later obtained her present position with a resume of Jaycee activities. (T. A210-211) She has recently successfully interviewed for a new position with Kodak. She had separate interviews lasting 30 to 40 minutes with seven men, each of whom inquired about her Jaycee activities. (T. A212) Her Jaycee activities have included serving on the Board of Directors in 1977-78. She is currently a vice president and supervises four committees and 40 to 50 people. (T. A208)

The Relationship of Local Chapters and the U.S. Jaycees

19. The U.S. Jaycees maintain a staff of approximately 83 to 84 persons in Tulsa. (T. B52) The respondent employs an executive director to develop programs with appropriate materials which may be implemented by local chapters. (Ex. 98, No. P-3) These programs are designed to accomplish the three Jaycee goals, namely, individual de-

velopment, community development and development of management ability. (T. A31-32; B41; Ex. 47) The programs or materials provided by respondent to local chapters relative to individual development include personal dynamics (Ex. 22), communication dynamics (Ex. 23), a speak-up program (Ex. 53, 38) and personal financial planning. (Ex. 38, 54) The program kits prepared by the U.S. Jaycees to promote community development include the Junior Athletic Championships (Ex. 40), Shooting Education, CPR, Energy Program, Government Affairs, and Institutional Chapters. (Ex. 39) The respondent publishes a wide range of materials related to chapter and state organization management such as Leadership Dynamics (Ex. 41, 42), Officers and Directors Guide (Ex. 6, 52), Chapter President's Management Handbook (Ex. 2) and others (Ex. 37, 43, 44, 51).

20. The local chapter may implement or decline to implement programs organized by respondent or may modify the programs to fit the local situation. (T. A34, A95, A99) The respondent believes that a new program is successful if approximately 1,000 of 8,800 local chapters pick it up. (T. B40) There are incentives to local chapters in the form of national awards for adoption of programs. (T. A109) Both the Minneapolis and St. Paul Chapters have adopted respondent's CPR program. (T. A154, A186) The state and local organizations may also initiate their own programs without respondent's approval (T. A94), for example, the state organization sponsors a "Jelly Week" with the proceeds of jelly sales being donated to help the mentally retarded (T. A96; Ex. 61); the Minneapolis Chapter sponsors an annual free Christmas dinner (T. A138, A150); and the St. Paul

Chapter sponsors the Patty Berg Golf Classic. (T. A178; Ex. 3)

21. The respondent also provides a wide range of products including personal items, travel accessories, casual wear, officer pins, awards, and gifts (Ex. 15) which may be purchased by members or non-members both through the mail and by telephone from the national office. (Ex. 80, p. 17; T. A80, B57) The products are featured in respondent's magazine. (Ex. 25) The Minnesota state office also maintains a number of respondent's products at its office for sale to local chapters and others. (T. A78, B57) The state organization receives a commission from respondent for its promotion of U.S. Jaycee products. (T. A79)

22. The Jaycee organization puts a great deal of emphasis on recruitment of new members. (Ex. 10, 11) The Minnesota State President spends approximately 80% of his time on recruitment related activities (T. A45), while the Minneapolis and St. Paul Presidents spend approximately half of their time on recruiting new members. (T. A125, A170) The respondent provides materials (Ex. 24, 45, 66, 70, 72, 73), contests and awards (T. A47, A58) and personnel (T. A53) to encourage and aid in signing up new members. The state and regional officers encourage the local chapters to acquire new members. (T. A132; Ex. 48, 50) The Minneapolis Chapter President estimated that 90% of his conversations with the state President and other officers concern recruitment. (T. A130; Ex. 69, 71)

23. The actual recruiting takes place at the local chapter level. (Ex. 12, 13; T. A90) The local chapter initially determines an applicant's eligibility (T. A91) although the Minneapolis and St. Paul Board of Directors routinely approve all applicants who are over 18 but not yet 35 years of

age. (T. A135, A175-176) In Minneapolis and St. Paul, a substantial number of members are recruited from the ranks of corporate management. (T. A183, A139, A148) This involves asking corporations to financially sponsor several of their employees. (Ex. 12; T. A125) Membership solicitation includes the statement that both men and women are eligible for membership. (Ex. 10, 11, 12) Some corporations have conditioned sponsorship upon allowing women as members. (T. A138-139)

A person accepted as a member by the local chapter automatically becomes a member of the Minnesota Jaycees and the U.S. Jaycees. The new regular member dues forwardable to the state Jaycee organization is $24, and the regular member renewal amounts to $19. Dues payment based on a computerized billing from the respondent (Ex. 56), are submitted on a monthly basis to the state organization which retains $12.50 and remits the balance to the respondent. The respondent then sends along $2.50 to the Jaycee International organization. (Ex. 35A-F; T. A72-74)

Other Testimony

24. Other national service organizations similar in structure to the U.S. Jaycees, such as Kiwanis International (Ex. A, p. 2; Ex. B), the International Association of Lions Club (Ex. D, p. 13), Rotary International (Ex. F, p. 217), Optimist International (Ex. G, p. 3) and the Association of Junior Leagues, Inc. (Ex. C, p. 4) have provisions in their constitutions or by-laws restricting membership on the basis of sex. (T. B65-66)

25. Undisputed testimony at the hearing showed that the Jaycee organization is different from other organizations in that it has a young, active membership (T. A87) and offers individual development programs in the areas

of personal, leadership and communications dynamics which are either unavailable or not available to the same degree in other organizations. (T. B54-55; Ex. 80, p. 6) A local chapter whose charter is revoked would suffer loss of the substantial goodwill and name recognition of the title "Jaycees" (T. A137, A140, A178, A182) as well as the loss of participation in Jaycee state and national conventions, seminars, insurance programs and awards, such as the Ten Outstanding Young Men selection. (Ex. 55, 76)

26. Gary W. Flakne, a member of the Minnesota House of Representatives from 1962 to 1973, and chief author in the House of the 1967 revision of the Human Rights statute, testified concerning that bill. (T. B68) The 1967 revision created the Department of Human Rights and broadened the statute to include a new definition of discrimination in public accommodations. (T. B82) Mr. Flakne testified that he could not recall any consideration at the time the law was passed as to whether or not organizations such as the Jaycees would be included within the definition of "public accommodations". (T. B84, 90)

27. That any of the foregoing Findings of Fact which might properly be termed Conclusions of Law are hereby adopted as such.

Based upon the foregoing Findings of Fact, the Hearing Examiner makes the following:

CONCLUSIONS OF LAW

1. That the Department of Human Rights gave proper notice of the hearing in this matter; that the Hearing Examiner has jurisdiction of this matter pursuant to Minn. Stat. Sec. 363.071 (1978) and Minn. Stat. Sec. 15.052 (1978); that the Department of Human Rights has fulfilled all

relevant, substantive and procedural requirements of law or rule.

2. That the complaint issued by the Commissioner in this matter was issued pursuant to Minn. Stat. Sec. 363.06 (1978).

3. Minn. Stat. Sec. 363.03, subd. 3 (1978) provides that:

> It is an unfair discriminatory practice:
>
> To deny any person the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of a place of public accommodation because of race, color, creed, religion, disability, national origin or sex. It is an unfair discriminatory practice for a taxicab company to discriminate in the access to, full utilization of or benefit from service because of a person's disability.

4. Minn Stat. Sec. 363.01, subd. 18 (1978) provides the following definition:

> "Place of public accommodation" means a business, accommodation, refreshment, entertainment, recreation, or transportation facility of any kind, whether licensed or not, whose goods, services, facilities, privileges, advantages or accommodations are extended, offered, sold, or otherwise made available to the public.

5. That the United States Jaycees discriminate on the basis of sex by denying women individual or regular membership.

6. That for the reasons set out in the Memorandum attached hereto, and incorporated herein by reference, the United States Jaycees are a place of public accommodation within the meaning of Minn. Stat. Sec. 363.01, subd. 18 (1978).

7. That the United States Jaycees has subjected the Minneapolis and St. Paul Chapters to sanctions and has announced its intention to revoke the charters of the Chapters because of their admission of women as individual or regular members.

8. That the United States Jaycees have therefore committed an unfair discriminatory practice in violation of Minn. Stat. Sec. 363.03, subd. 3 (1978).

9. Minn. Stat. Sec. 363.071, subd. 2 (1978) provides in part that:

> . . . if the hearing examiner finds that the respondent has engaged in an unfair discriminatory practice, the hearing examiner shall issue an order directing the respondent to cease and desist from the unfair discriminatory practice found to exist and to take such affirmative action as in the judgment of the examiner will effectuate the purposes of this chapter.

Pursuant to the foregoing Conclusions of Law, the Hearing Examiner makes the following:

ORDER

It is hereby ordered that the United States Jaycees shall cease and desist and is hereby enjoined from:

(1) Revoking the charter of any Jaycee local organization member ("local chapter") or state organization member (the "Minnesota Jaycees") within the State of Minnesota or denying any privilege or right of membership, or otherwise discriminating in any manner against a local or state organization member within the State of Minnesota because either extends to women all the rights and privileges of individual or regular membership.

(2) Discriminating on the basis of sex against any member or applicant for membership of a Jaycee local chapter

within the State of Minnesota with respect to the terms, conditions, or privileges of membership in the local chapters or in the Minnesota Jaycees or in the United States Jaycees.

Dated: October 9, 1979.

GEORGE A. BECK
State Hearing Examiner

NOTICE

Pursuant to Minn. Stat. Sec. 363.071, subd. 2 (1978), this Order is the final decision in this case and under Minn. Stat. Sec. 362.072 (1978), the Commissioner of the Department of Human Rights or any other person aggrieved by this decision may seek judicial review pursuant to Minn. Stat. Sec. 15.0424, and Minn. Stat. Sec. 15.0425 (1978).

MEMORANDUM

Standing to Prosecute

The respondent has maintained that the named complainant, William L. Wilson, lacks standing to prosecute this matter since a successor has been appointed and confirmed. The matter of succession of public officials in state administrative proceedings is not treated in either statute or rule. In federal court (FRCP Rule 25(d)(i)) and Minnesota appellate practice (MRCAP Rule 143.04), succession is automatic while in district court in Minnesota substitution is by motion upon a showing that the successor intends to continue the action. (MRCP Rule 25) In the absence of any specific state administrative rule, the request for successor should be made by a motion pursuant to 9 MCAR Sec. 2.213 B.

In a September 4, 1979 letter, which accompanied the complainant's final brief in this case, complainant's attorney stated that "Commissioner McClure intends and has

intended to have this action continued." Complainant's reply brief added the present Commissioner's name to the title of the proceeding. This procedure would normally preclude any reply by the respondent, however, as a practical matter there is little for the respondent to say once the Commissioner indicates her intention to continue the prosecution in this matter. It appears that the specific functions which the statute requires the Commissioner to do, such as service of the charge, determination of probable cause, and issuance of a complaint were in fact performed by former Commissioner Wilson. Accordingly, since no prejudice has been shown, it is concluded that the addition of Commissioner McClure as a party should be allowed despite the procedural failure to accomplish the matter by a formal motion on the record pursuant to the appropriate rule.

Constitutional Questions

As set out in Findings of Fact No. 5-7, the parties to this case have agreed to reserve all federal constitutional claims for determination by the United States District Court. Notwithstanding this agreement, the respondent urges that two constitutional claims should be considered insofar as necessary to do so in order to abide by the maxim (codified at Minn. Stat. Sec. 645.17(3)) that statutes should not be interpreted in a manner which would render them unconstitutional. The respondent believes that subjecting its membership policy to the Minnesota Human Rights Act would (1) violate its First Amendment right to freedom of association, and (2) violate the due process clause of the Fourteenth Amendment since there are misdemeanor penal consequences and the statute is ambiguous and vague, requiring persons to guess at whether or not they might be included within its language. In deference to the greater ex-

pertise of the federal court and its Order relating to this matter, and recognizing that these questions would need to be redetermined upon appeal, these issues will not be extensively dealt with herein. The Examiner, after a careful review of the arguments and consideration of the authorities cited, is satisfied that the constitutional right to freedom of association will not protect unlawful discrimination by an organization which is not in fact private. *Bell v. Maryland*, 378 U.S. 226, 313-314, 12 L.Ed.2d 22, 84 S. Ct. 1814 (1964). Additionally, even though the Minnesota Human Rights Act contains a criminal or penal remedy, this does not mean that, in an action for civil relief, the statute must be construed by a criminal standard in regard to vagueness. Our court has stated that while a "*criminal* statute must be definite as to persons within the scope of a statute and the acts which are penalized" (emphasis added), ". . . where a statute contains remedial and penal provisions, the former are to be construed liberally and the latter strictly." *State v. Moseng*, 245 Minn. 263, 95 N.W.2d 6, 11 (1959).

Statutory Interpretation

The fundamental question to be decided in this proceeding is whether or not the United States Jaycees fall within the definition of "place of public accommodation" so that their admitted sex discrimination in regard to membership thereby becomes an unfair discriminatory practice prohibited by the Minnesota Human Rights Act. The complainant believes that the U.S. Jaycees are a "business . . . facility of any kind . . . whose goods, services, . . . privileges, advantages . . . are extended, offered, sold or otherwise made available to the public."

The existence of a legislative history for the statutory provisions in question would, of course, be particularly valuable in regard to the question of legislative intent. No such written history exists for the 1967 legislative session which session produced a substantial revision of the human rights law including the definition in question here. The chief author of the House bill, Gary Flakne, testified concerning his recollection of the passage of the legislation. The general rule is that the opinion of one legislator cannot be equated with or even considered when ascertaining legislative intent. 82 C.J.S. Statutes Sec. 354, *Iowa St. Educ. Assoc. —Iowa Higher Educ. Assoc. v. Public Employment Relations Board*, 269 N.W.2d 446, 448 (Ia. 1978), 2A SUTHERLAND, STATUTES AND STATUTORY CONSTRUCTION, Sec. 48.16 (4th ed. 1972) The most that can be gleaned from Mr. Flakne's testimony, however, is that the question of whether or not organizations such as the respondent might fall within the definition of "place of public accommodation" was simply not specifically considered by the legislature. (Finding of Fact No. 26).

The legislature did, however, provide some direct help in ascertaining its purpose. Minn. Stat. Sec. 363.11 (1978) provides in part that, "The provisions of this chapter shall be construed liberally for the accomplishment of the purposes thereof." Minn. Stat. Sec. 363.12 (1978) also declares, in part, that:

> Subdivision 1. It is the public policy of this state to secure for persons in this state, freedom from discrimination;
>
> . . .
>
> (3) In public accommodations because of race, color, creed, religion, national origin, sex, marital

status, disability and status in regard to public assistance;

As the legislative direction indicates, the Minnesota Human Rights Act is remedial legislation and as such should be liberally interpreted in order to suppress the evil and advance the remedy. "What is called a liberal construction is ordinarily one which makes the statutory rule or principle apply to more things or in more situations than would be the case under a strict construction." 3 SUTHERLAND, STATUTES AND STATUTORY CONSTRUCTION, Sec. 60.01, at 29 (4th ed. 1972)

The courts of other states have followed this general rule in interpreting their human rights acts. In *Ohio Civil Rights Comm. v. Lysyj*, 38 Ohio St. 2d 217, 313 N.E.2d 3 (1974), the court found a trailer park to be a place of public accommodation and observed that:

> When determining the scope of the "public accommodations" amendments to Chapter 4112, the commission, initially, and the courts, upon review, are to construe these statutes liberally in order to effectuate the legislative purpose and fundamental policy implicit in their enactment, and to assure that the rights granted by the statute are not defeated by an overly restrictive interpretation. 313 N.E.2d at 6.

The language of the Minnesota definition of "public accommodations" places it among those states which have broader and more general definitions as opposed to those states that specifically list the businesses covered. The more general definition has the effect of more extensive coverage. *Discrimination in Access to Public Places: A Survey of State and Federal Accommodations Laws*, 7 N.Y.U. Review of Law and Social Change 215, 242 (Spring 1978)

The pre-1967 public accommodations provision in Minnesota law (which has not been explicitly repealed), Minn. Stat. Sec. 327.09 (1978) reads as follows:

> No person shall be excluded, on account of race, color, national origin, or religion from full and equal enjoyment of any accommodation, advantage, or privilege furnished by public conveyances, theaters, or other public places of amusement, or by hotels, barber shops, saloons, restaurants, or other places of refreshments, entertainment, or accommodations.

The move from this more specific definition to the existing general language would seem to evidence a legislative intent to expand the coverage of the public accommodations provisions.

In the case of a statute which has a general applicability, its language may often appear to be ambiguous when applied to specific fact situations. It is because of this that the legislature's directives as to intent and purpose at Minn. Stat. Sec. 363.11 (1978) and Sec. 363.12 (1978) assume large importance. It is often held that:

> Legislative purpose may also be a valuable guide to decision in cases where the effect of a statute or the situation at hand is unclear either because the situation was unforeseen at the time when the act was passed, in which case it represents a somewhat unorthodox way of speaking to say that the legislature had any real intent with reference to the unprovided-for case, or the statutory articulation of rule or policy is so incomplete that it cannot clearly be said to speak to the situation or issue.

2A SUTHERLAND, STATUTES AND STATUTORY CONSTRUCTION, Sec. 45.09 at 29 (4th ed. 1972) The inter-

pretation of Minn. Stat. Sec. 363.01, subd. 18 then, must be made with the foregoing in mind.

The Language of Minn. Stat. Sec. 363.01, subd. 18 (1978)

The respondent argues that the term "business" in the statutory definition refers only to "income or profit producing activities". According to Black's Law Dictionary (5th Ed. 1979), the term business may have a varied meaning from "commercial activity engaged in for gain or livelihood" to "enterprise in which person engaged shows willingness to invest time and capital on future outcome". The complainant has pointed out that the payment of dues by members and the return of leadership training programs by the Jaycees is not unlike the purchase of training courses from a for-profit organization such as Dale Carnegie. The respondent is also engaged in the sale of products to members and the public. Our Minnesota Supreme Court has observed that:

> When one speaks of "business" the mind naturally contemplates a commercial or industrial establishment or enterprise. That word, however, may have other and different meanings depending upon the use to which it is put. It is also defined as "that which one has to do or should do; that which one may rightfully or justifiably concern himself or meddle with; . . . that which busies, or engages time, attention, or labor, as a principal serious concern or interest. (Citation omitted)

State v. Lakewood Cemetery, 197 Minn. 501, 267 N.W. 510, 512 (1936)

Where the statute is entitled to a liberal construction, as in this case, other courts have given the term business a comprehensive meaning so as to, for example, classify a church

as a business for workers' compensation purposes. *See, Meyers v. Southwest Reg. Conf. Ass'n. of Seventh Day Adventists*, 230 La. 310, 88 So.2d 381, 384 (1956). Non-profit organizations such as the YMCA have been included within the federal statute despite non-profit status. *Smith v. Young Men's Christian Ass'n.*, 462 F.2d 634, 648 (5th Cir. 1972). Similarly, in *National Organization for Women, Essex Co. Ch. v. Little League Baseball, Inc.*, 127 N.J. Super. 522, 318, A.2d 33, 38 (1974), the court stated that, "We discern nothing in the statute or its underlying purposes to persuade us that what would otherwise be a place of public accommodation is any less so because its management and sponsorship is by a nonprofit or membership organization rather than a commercial enterprise . . . ." The court decided that the Little League was a public accommodation and was therefore prohibited from excluding girls from its teams. The respondent is a business within these cases and within our definition of "place of public accommodation" which is to be liberally interpreted.

A related question is whether the use of the word "place" in the phrase which is actually defined and the use of the word "facility" in the definition itself serves to limit the scope of the definition to entities with identifiable physical locations so as to exclude the respondent. Although it should be noted that the respondent maintains an office in Chaska, Minnesota and that both the state and local organizations conduct their activities at various "places" within this state, several courts have concluded that public accommodation definitions should not be so limited as urged by the respondent.

In *Little League Baseball, supra,* the court observed that:

> The statutory noun "place" (of public accommodation) is a term of convenience; not of limitation. It is employed to reflect the fact that public accommodations are commonly provided at fixed "places" e.g. hotels, restaurants, swimming pools, etc. But a public conveyance, like a train, is a "place" of public accommodation although it has a moving situs. 318 A.2d at 37.

A recent trial court decision issuing a preliminary injunction against the respondent in the District of Columbia also held that the word "place" does not so limit the coverage of the definition. *Bloomfield v. District of Columbia Junior Chamber of Commerce and United States Jaycees,* Civil Act. No. 491-79 (Super.Ct. D.C., filed Sept. 17, 1979). The D.C. Court preliminarily enjoined the U.S. Jaycees from revoking the charter of the local Jaycee chapter or otherwise discriminating in their membership policy on the basis of sex

The commentators also agree that state definitions of a "place of public accommodations" apply to situations where a service is the dominant exchange and the facility is either incidental or non-existent. *See,* Avins, *What is a Place of "Public" Accommodation?,* 52 Marquette L.Rev. 1, 59 (1968) and *Discrimination in Access to Public Places: A Survey of State and Federal Accommodations Laws,* 7 N.Y.U. Review of Law and Social Change 215, 218 (Spring 1978). Respondent's interpretation might permit a lawn service, a taxi company, or a door-to-door salesman to discriminate. Such an interpretation would obviously not be an accurate reading of this statute and cannot be sustained.

The U.S. Jaycees have suggested that while the Jaycees may be subject to the public accommodations provisions as to their external functions, such as admission to the Patty Berg Golf Classic, the membership practices, which respondent believes should be equated with the ownership of a business corporation, are not subject to the statute. This distinction is without force since the crucial question is whether or not the organization is within the definition of a public accommodation and not private, not whether or not the group which receives the advantages of the organization might be called members or customers. A "private club" which featured nude dancing and sold a "membership" at the door would not thereby avoid our statute. Neither would the membership policies of a food cooperative or a health club.

The respondent seeks to shift the focus of this proceeding to the offering of chapter memberships by the national organization and claims that this "offering" is more selective since applicants to become local chapters must show that they are of good repute and organized for purposes consistent with those of the respondent. Although the offering of charter memberships may be somewhat more selective than the offering of individual memberships, shifting the focus in this manner ignores the reality of the integrated operation of national, state, and local organizations in regard to solicitation of members. It is clear that the solicitation of individual members at the local level is the lifeblood of the Jaycee organization. Realistically, it is respondent's attempt to control and restrict the local chapter's offering of memberships which is the substance of this case, not the nature of respondent's offering of charter memberships.

The Public Nature of the Jaycees

Many of the state statutes prohibiting discrimination in public accommodations provide a specific exemption for clubs or organizations which are "distinctly private". (*See*, e.g. Ore. Rev. Stat. Sec. 30.675(2)). Likewise, the federal law excepts private clubs. (42 U.S.C. Sec. 2000a(e)) Our statute does not explicitly contain this exception, but it does provide that the goods, services, or advantages offered must be "made available to the public" before an organization is included within the definition.

The United States Jaycees, the Minnesota state organization, and the St. Paul and Minneapolis Chapters are not operated as private organizations and do offer their services and advantages to the public. The record indicates that membership in the Minneapolis and St. Paul Chapters is open to anyone who is between the ages of 18 and 35. There is no screening of prospective members and the local board of directors routinely approve all prospective members submitted. The local officers could recall no instance of a rejection of an application for membership. While the Jaycee program attracts young people involved in business, and particularly those in corporate management, membershp is offered to those in all walks of life by means such as door-to-door solicitation for membership. The national and state organizations encourage a diverse membership. The restriction of membership by age group apparently did not make the Boy Scouts a private organization within the meaning of the Oregon statute. *Schenck v. Boy Scouts of America*, 551 P.2d 465, 473 (Ore. 1976). In the *Schenck* case, a girl unsuccessfully sought to join the Cub Scouts and the court concluded that the Boy Scouts did not come within the Oregon definition of "place of public accommoda-

tion". This interpretation, however, was based solely upon the existence of a legislative history which included a discussion of the applicability of the public accommodation provision. As has been discussed, no such history is available in Minnesota. *See also, U.S. v. Slidell Youth Football Ass'n.*, 387 F.Supp. 474, 476 n. 1, 483 (E.D. La. 1974) (football program open to youth age 7 to 13 was place of public accommodation) and *Little League Baseball, supra.*

There can be no doubt that members of genuinely private clubs do have a substantial privacy interest with respect to their membership practices. They obviously would not fall within the definition of a "place of public accommodation". The attributes of a private club have been enumerated by the federal courts and include such items as selectiveness of admission, formal membership procedures, membership control over new members, and substantial dues, none of which would identify the respondent as a private club. *See, Cornelius v. Benevolent Protective Order of the Elks*, 383 F.Supp. 1182 (D.C. Conn. 1974). The *Cornelius* court observed that, "To have their privacy protected, clubs must function as extensions of members homes and not as extensions of their businesses." 382 F.Supp. at 1204.

An examination of the nature of the Jaycee organization, and the two local chapters involved in this case, in particular, discloses that the organizations involved are more of a business than a social nature. The Jaycees were organized as the U.S. Junior Chamber of Commerce and originally had the sole purpose of promoting the business interests of its members. *See, N.Y. City Jaycees, Inc. v. The U.S. Jaycees, Inc.*, 512 F.2d 856, 858 (2nd Cir. 1975). The women who testified in this proceeding (Findings of Fact No. 16 to 18) gave vivid examples of the way that regular membership

and participation at the officer or director level in the Jaycees directly benefited their business career. The record shows that not only have these women benefited generally from the skills that they acquired in the Jaycees, but participation has also led to promotion. One of the women was encouraged to join by her personnel department as a step in her advancement in her company.

To deny this training and help in advancement to women in business while it is fully available to men would place women at a significant competitive disadvantage. Although the respondent would permit women to join as "associate members", this means that they could not vote, could not hold an office such as vice president or director, and could not receive awards. The testimony documents the importance of holding office and receiving awards to both leadership training and career advancement. It would make little sense to guarantee women an equal opportunity in employment while denying them access to activities designed to help in career advancement. As Judge Heany noted in dissent in *Junior Chamber of Commerce of Kansas City v. The Missouri State Junior Chamber of Commerce and the U.S. Jaycees*, 508 F.2d 1031, 1035 (8th Cir. 1975), "The by-laws of the U.S. Jaycees make it clear that they are not merely an organization designed to engage in good works. They are rather an organization primarily designed to train future leaders for civic and business responsibilities."

The legislature has made plain the seriousness with which it views such discrimination by declaring the public policy in this state to be that, "The opportunity to . . . full and equal utilization of public accommodations . . . without such discrimination as is prohibited by this chapter is hereby recognized and declared to be a civil right." Minn. Stat. Sec.

363.12, subd. 2 (1978), and by declaring that, "Such discrimination threatens the rights and privileges of the inhabitants of this state and menaces the institutions and foundations of democracy." Minn. Stat. Sec. 363.12, subd. 1(5) (1978).

While the matter of placing women at a competitive disadvantage in the marketplace is a serious enough form of discrimination, there is perhaps an even more serious concern involved when a person is compelled to accept an inferior or second class status in an organization open to the public because of his or her sex. As the dissent in *Schenck, supra*, pointed out:

> The evil at which this type of legislation is aimed is not simply the unfairness which results in denying certain materials to one group when they are at the same time made available to others; it is aimed at the elimination or practices which deprive a person of his individuality by insisting that he bear the stamp of his class. 551 P.2d at 471.

The United States Jaycees are prohibited by our Minnesota Human Rights Act from insisting that women in this state accept a membership status in the Jaycees inferior to that accorded to men.

The respondent has suggested that a ruling in this proceeding will affect other organizations such as the Kiwanis, Lions, or others which have similar by-laws. The short answer to this concern is that the Order in this case necessarily applies only to the respondent. There is, of course, little evidence in the record concerning other organizations which might be similar to the respondent. However, it is conceivable that respondent is unique in certain respects such as: (1) the large number of business people in its membership; (2)

the extent of its leadership training program; (3) its lack of admission requirements; (4) its emphasis on recruitment of new members; (5) its ties to corporations through both sponsorship of members and corporate recognition of the value of Jaycee training; (6) minimal membership control over admissions; (7) its significant current female membership; and (8) its orientation toward civic and business activities as opposed to social activities. Such a determination cannot be made in this case.

G.A.B.

RESPONDENT EXHIBITS

Respondent Exhibit A	Kiwanis International Constitution and Bylaws/As amended to and including June 27, 1978
Respondent Exhibit B	1977 Roster, Kiwanis Club of Minneapolis (Downtown)
Respondent Exhibit C	Association Bylaws/Policies, Standing Rules, Procedures/The Association of Junior Leagues, Inc., September, 1977
Respondent Exhibit D	The International Association of Lions Clubs Constitution and By-Laws/As amended June 24, 1978
Respondent Exhibit E	"Welcome to Minneapolis Rotary!"/Rotary Club of Minneapolis
Respondent Exhibit F	Constitution of Rotary International/ Pages 217-221
Respondent Exhibit G	1978-1979 Constitution and Bylaws/ Optimists International
Respondent Exhibit H	Exemption letter from the Internal Revenue Service/March 17, 1964

Respondent Exhibit I	Exemption letter from the Internal Revenue Service/April 29, 1976
Respondent Exhibit J	Certificate of Acceptance and Articles of Acceptance, All Amendments Filed Thereto of The United States Jaycees

COMPLAINANT EXHIBITS

Complainant Exhibit 1	Bylaws and Policy Manual/United States Jaycees
Complainant Exhibit 2	1977-78 Chapter President's Management Handbook/U.S. Jaycees Management Development Series
Complainant Exhibit 3	"For a Richer Life . . . A Better Community . . ./The St. Paul Jaycees
Complainant Exhibit 4	The St. Paul Jaycees '74-'75 Roster
Complainant Exhibit 5	The St. Paul Jaycees 1978-79 Membership Directory
Complainant Exhibit 6	Officers' & Directors' Guide 1978-79/ U.S. Jaycees
Complainant Exhibit 7	(Not Offered.)
Complainant Exhibit 8	(Not Offered.)
Complainant Exhibit 9	(Not Offered.)
Complainant Exhibit 10	Letter/James P. Durbin, VP Membership to Board Member/September 22, 1978
Complainant Exhibit 11	Letter/James P. Durbin, Vice President for Membership to Jaycee/September 22, 1978
Complainant Exhibit 12	Materials used in Corporate Recruitment/ Minneapolis Jaycees
Complainant Exhibit 13	Materials used in Individual Recruitment/ Minneapolis Jaycees
Complainant Exhibit 14	St. Paul Jaycees/Plan of the Year/1978-1979

Complainant Exhibit 15	The 1978-79 United States Jaycees Products-RSVP Catalog
Complainant Exhibit 16	Bylaws of St. Paul Jaycees/Revisions to May 4, 1978
Complainant Exhibit 17	Bylaws of Minneapolis Jaycees, Inc.
Complainant Exhibit 18	Minneapolis Jaycees/Plan of Action/1978-1979
Complainant Exhibit 19	(Not Offered.)
Complainant Exhibit 20	(Not Offered.)
Complainant Exhibit 21A	St. Paul Jaycees/Annual Financial Report for the year ended April 30, 1978
Complainant Exhibit 21B	St. Paul Jaycees/Financial Report/Nine months ended January 31, 1979
Complainant Exhibit 22	Personal Dynamics, Personal Growth Series/The United States Jaycees
Complainant Exhibit 23	Communication Dynamics in the Personal Growth Series of the United States Jaycees
Complainant Exhibit 24	'If Someone Would Only Ask!"/United States Jaycees Recruitment Manual
Complainant Exhibit 25	Future/Official Publication of the United States Jaycees/May, June 1978
Complainant Exhibit 26	Future/Official Publication of the United States Jaycees/November, December 1978
Complainant Exhibit 27	(Not Offered.)
Complainant Exhibit 28	(Not Offered.)
Complainant Exhibit 29	(Not Offered.)
Complainant Exhibit 30	The Gopher Jaycee/Official Publication of the Minnesota Jaycees/January, 1979
Complainant Exhibit 31	(Not Offered.)
Complainant Exhibit 32	(Not Offered.)

Complainant Exhibit 33	The Leadership Letter/Minnesota Jaycees/ January, 1979
Complainant Exhibit 34	(Not Offered.)
Complainant Exhibit 35A	U.S. Jaycees State Monthly Membership Report
Complainant Exhibit 35B	Dues Computation Form/Minnesota Jaycees
Complainant Exhibit 35C	Instructions for Forms/United States Jaycees
Complainant Exhibit 35D	Chapter Bill/U.S. Jaycees to State
Complainant Exhibit 35E	Computer Printout/U.S. Jaycees to State
Complainant Exhibit 35F	New Member Form/U.S. Jaycees to State
Complainant Exhibit 35G	Identification Card/U.S. Jaycees
Complainant Exhibit 36	(Not Offered.)
Complainant Exhibit 37	"The Important Steps to a Well-Managed Jaycee Organization"/U.S. Jaycees
Complainant Exhibit 38	Individual Development Programs/U.S. Jaycees
Complainant Exhibit 39	The Community Development Digest/U.S. Jaycees
Complainant Exhibit 40	Junior Athletic Championships/U.S. Jaycees
Complainant Exhibit 41	Leadership Dynamics/U.S. Jaycees
Complainant Exhibit 42	Leadership Dynamics/Chairman's Guide/ U.S. Jaycees
Complainant Exhibit 43	Committee Chairman's Workbook/U.S. Jaycees
Complainant Exhibit 44	Regional Director's Handbook, 1977-78/ U.S. Jaycees
Complainant Exhibit 45	State President Incentive/March-April/ U.S. Jaycees
Complainant Exhibit 46	The Link to a Stronger Organization/ U.S. Jaycees
Complainant Exhibit 47	Plan of Action/1978-79/Minnesota Jaycees

Complainant Exhibit 48	The Leadership Letter/Minnesota Jaycees/ April, 1979
Complainant Exhibit 49	Blue Chip Requirements/Minnesota Jaycees
Complainant Exhibit 50	Monthly Membership Summary as of March 31, 1979/Minnesota Jaycees
Complainant Exhibit 51	Leadership in Action Workbook/U.S. Jaycees
Complainant Exhibit 52	"There's Something Obvious About You" 1977-78 Officers and Directors Guide/ U.S. Jaycees
Complainant Exhibit 53	Member's Guide to Speak Up/Developed by U.S. Jaycees
Complainant Exhibit 54	Future/Official Publication of the United States Jaycees/March, April, 1979
Complainant Exhibit 55	Future/Official Publication of the United States Jaycees/January, February, 1979
Complainant Exhibit 56	Chapter Billing for April, 1979/U.S. Jaycees
Complainant Exhibit 57	Minneapolis Jaycees Roster/77-78
Complainant Exhibit 58	Minneapolis Jaycees Roster/1978-79
Complainant Exhibit 59	Minneapolis Jaycees Roster/76-77
Complainant Exhibit 60	Minneapolis Jaycees Roster/1975-76
Complainant Exhibit 61	The Leadership Letter/Minnesota Jaycees/ March, 1979
Complainant Exhibit 62	(Not Offered.)
Complainant Exhibit 63	(Not Offered.)
Complainant Exhibit 64	(Not Offered.)
Complainant Exhibit 65	Promotional Mailing/Minnesota Jaycees/ December 28, 1978
Complainant Exhibit 66	Monthly Incentive/May, June/U.S. Jaycees
Complainant Exhibit 67	(Not Offered.)
Complainant Exhibit 68	(Not Offered.)
Complainant Exhibit 69	Mailing to Locals from State/September, 1978

Complainant Exhibit 70	Newsletter from U.S. Jaycees to State Officers
Complainant Exhibit 71	September Incentive to Locals from State/ 1978
Complainant Exhibit 72	United States Jaycees Enrollment & Growth Department Monthly Membership Activity Report As of November 30, 1978
Complainant Exhibit 73	United States Jaycees Enrollment & Growth Department Monthly Membership Activity Report As Of October 31, 1978
Complainant Exhibit 74	The Leadership Letter/Minnesota Jaycees January, 1979
Complainant Exhibit 75	(Not Offered.)
Complainant Exhibit 76	Awards Manual/1978-79/U.S. Jaycees
Complainant Exhibit 77	Letter/December 15, 1978/Barry L. Kennedy, President, U.S. Jaycees to D. A. Aberg, President, St. Paul Jaycees, Re: Charter Revocation
Complainant Exhibit 78	Letter/December 15, 1978/Barry L. Kennedy, President, U.S. Jaycees to V. Vavere, President, Minneapolis Jaycees, asking Chapter to appear at hearing re: charter revocation
Complainant Exhibit 78	Partial Membership Roster Printout/ May, 1978
Complainant Exhibit 79	(Not Offered.)
Complainant Exhibit 80	U.S. Jaycees Annual Report/1977-1978
Complainant Exhibit 81	Charge of Discrimination/Sally Pedersen/ December 12, 1978
Complainant Exhibit 82	Charge of Discrimination/Valdis Vavere/ December 12, 1978

Complainant Exhibit 83	Charge of Discrimination/Michelle Mayer/ December 12, 1978
Complainant Exhibit 84	Charge of Discrimination/Paul Grisim/ December 12, 1978
Complainant Exhibit 85	Affidavit of Service of Charges/Roxane M. Capiz/December 20, 1978, upon Barry R. Kennedy
Complainant Exhibit 86	Return Receipt/Certified Letter to Barry R. Kennedy/No. 432202, December 22, 1978
Complainant Exhibit 87	Receipt for Certified Mail/Barry R. Kennedy/ December, 1978
Complainant Exhibit 88A and 88B	Two-Page Letter/William L. Wilson, Commissioner, Department of Human Rights to Barry R. Kennedy/December 19, 1978
Complainant Exhibit 89	Charge of Discrimination/Daniel Aberg, Briar Leonard, Georgene Loveless, Kathleen Hawn/ December 12, 1978
Complainant Exhibit 90A and 90B	Two-Page Letter/William L. Wilson, Commissioner, Department of Human Rights to Barry Kennedy/December 15, 1978
Complainant Exhibit 91	Affidavit of Service of Charge/Laurel Goff/ December 15, 1978, upon Barry Kennedy
Complainant Exhibit 92	Return Receipt/Certified Letter/Barry Kennedy/No. 262579 Receipt for Certified Mail/Barry Kennedy/ No. 262579
Complainant Exhibit 93	Letter/William L. Wilson, Commissioner, Department of Human Rights to Barry Kennedy/January 25, 1979
Complainant Exhibit 94	Affidavit of Service of Complaint and Notice of Hearing/Richard L. Varco, Jr./ January 25, 1979

Complainant Exhibit 95	Return Receipt/Certified Mail/Barry Kennedy/No. 432207 Receipt for Certified Mail/Barry Kennedy/No. 432207
Complainant Exhibit 96	Proposed Resolution of the Saint Paul Area Chamber of Commerce/October 16, 1978
Complainant Exhibit 97	Position Descriptions/U.S. Jaycees
Complainant Exhibit 97	(Not Offered.)
Complainant Exhibit 98	Position Descriptions/U.S. Jaycees
Complainant Exhibit 99	The United States Jaycees Annual Report/1975-1976

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT
September Term 1982

No. 82-1493

THE UNITED STATES JAYCEES,
a non-profit Missouri corporation, on
behalf of itself and its qualified members,
Appellant,

vs.

MARILYN E. McCLURE, Commissioner,
Minnesota Department of Human Rights;
WARREN SPANNAUS, Attorney General of
the State of Minnesota; and
GEORGE A. BECK, Hearing Examiner of
the State of Minnesota,
Appellees.

Appeal from the United States
District Court for the
District of Minnesota

The Court, having considered appellees' petition for rehearing and suggestions for rehearing en banc and being now fully advised in the premises, hereby orders the petition for rehearing and suggestions for rehearing en banc denied by an evenly divided court.

The attached dissent by Judge Heaney is joined in by Chief Judge Lay, Judge Bright and Judge McMillian.

August 1, 1983

HEANEY, Circuit Judge—I would grant the petition for rehearing en banc.

The Minnesota Legislature decided that it would take permissible constitutional steps to eliminate discrimination in economic matters because of sex. To this end, it passed Minnesota Statute, Section 363.03(3) (1980), which makes it an unfair discriminatory practice to deny any person the full and equal enjoyment of the services, privileges and advantages of a place of public accommodation because of sex.

The Minnesota Department of Human Rights found that the United States Jaycees was a place of public accommodation within the meaning of the statute. It also found that the Jaycees had discriminated against women by denying them full membership in the organization. The Minnesota Supreme Court reached a similar conclusion. In so doing the Court noted that the Jaycees is a business organization whose primary aim is to advance the business careers of its members.

We should accept the public policy decision of the Minnesota Legislature and the holding of the Minnesota Supreme Court. Both are fully supported by the record.

Young women are entitled to share in the good jobs in our society according to their abilities. They will not share fully in these jobs, however, as long as young men are exclusively eligible for membership in the "right business organization," which gives them an edge in hiring for and promotion to leadership positions. To be sure, the Jaycees sponsor many social activities and events. They also take positions on some of the great issues of our time. But these activities are not central to their purpose. The central purpose is rather to learn the techniques and skills and to form the acquaintances that will serve as a basis for leadership positions today and tomorrow.

Young men have the right to associate with whomever they please, but under Minnesota law they should not be able to form an organization that is primarily business oriented and exclude young women from that organization when the effect of that exclusion is to deprive the latter of an equal opportunity for leadership positions.

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MARILYN E. McCLURE, Commissioner,
Minnesota Department of Human Rights;
WARREN SPANNAUS, Attorney General of
the State of Minnesota; and
GEORGE A. BECK, Hearing Examiner of
the State of Minnesota,
Appellees.

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that Irene Gomez-Bethke, and Hubert H. Humphrey, III, successors in office to Marilyn E. McClure and Warren Spannaus, respectively, together with George A. Beck, appellees above-named, hereby appeal to the Supreme Court of the United States from the judgment entered in this action on June 7, 1983. This appeal is taken pursuant to 28 U.S.C. § 1254(2).

Dated: October 7, 1983.

HUBERT H. HUMPHREY, III
Attorney General
State of Minnesota
By: KENT G. HARBISON
Chief Deputy Attorney General
Counsel of Record
102 State Capitol Building
St. Paul, Minnesota 55155
Telephone: (612) 296-2351
RICHARD L. VARCO, JR.
Special Assistant
Attorney General
1100 Bremer Tower
7th Place and Minnesota Street
St. Paul, Minnesota 55101
Telephone: (612) 296-7862
Attorneys for Appellees

Filed
Oct. 11, 1983
Robert D. St. Vrain
Clerk